United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

363

No. 24,617

363A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL B. ANDERSON, Cadet, U.S.A., *et al.*,

Appellants,

v.

MELVIN R. LAIRD,
Secretary of Defense of the U.S.A., *et al.*,

Appellees.

BRIEF FOR APPELLANTS

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INDEX

AUTHORITIES CITED

Cases:

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* Cases principally relied upon.

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BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

1. Can the federal government compel a student at a federal military academy to attend church or chapel, and punish him for refusing to attend?

2. Where it is conceded that the federal government is compelling persons to attend church or chapel, and punishing them for refusing to attend, is

it necessary in determining whether there has been a violation of the Establishment Clause of the First Amendment to inquire into the purpose and primary effect of the requirement?

3. Did the trial Court err in finding that the sole purpose and primary effect of the mandatory chapel regulations are to enhance the understanding of cadets and midshipmen of the role that religion plays in the lives of others?

4. Is the Free Exercise Clause of the First Amendment violated by Academy regulations restricting transfer of church or chapel attendance to persons having parental and clerical approval of the proposed change and who are willing to profess a "sincere desire" to affiliate with the new denomination?

5. Do the compulsory chapel regulations at the service academies constitute a "religious test" for holding office under the United States in violation of Article VI of the Constitution?

6. Did the trial Court err in excluding evidence of the results of a survey on the subject of mandatory chapel conducted among cadets at the United States Military Academy?

PRIOR PROCEEDINGS IN THIS COURT

This case has come before this Court on three occasions.[1] Plaintiffs initially sought and were denied a temporary restraining order in the District Court enjoining enforcement of the mandatory chapel regulations *pendente lite*. Appeal from this denial was taken forthwith to this Court and on January 30, 1970, after hearing, this Court ordered that no punitive action be taken against any of the named plaintiffs for their refusal to comply with the mandatory chapel regulations until final determination of plaintiffs' motion for preliminary

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[1] On all three occasions, the panel included Chief Judge Bazelon and Circuit Judge Robinson. Circuit Judge Robb participated on the initial panel. The docket number of the case on these prior hearings, under the same name as at present, was No. 23,906.

injunction. In February and again in March of 1970 the case came before this Court on motions by plaintiffs for Show Cause Orders for disregard of this Court's order of January 30, 1970.

REFERENCES TO RULINGS

The basis of the order appealed from is contained in the Opinion and Order of July 31, 1970 (App. 39).

STATEMENT OF THE CASE

A. Prior Proceedings

This is a class action for declaratory and injunctive relief, and for relief in the nature of *mandamus*. Plaintiffs are cadets and midshipmen at the United States Military Academy at West Point and the United States Naval Academy at Annapolis. The minor plaintiffs sue by their next friend, Robert J. Drinan, S.J., Dean of the Boston College Law School. Plaintiffs sue on behalf of themselves and the entire class of persons composed of midshipmen at the United States Naval Academy, cadets at the United States Military Academy and cadets in their first, second and third years at the United States Air Force Academy. The defendants are the Secretary of Defense and the Secretaries of the Army, Navy and Air Force. Jurisdiction vests under 28 U.S. Code Sections 1331, 1332, 1361, 2201 and 2202.

Plaintiffs seek by this action to have declared unconstitutional those regulations of the respective military academies which require cadets and midshipmen to attend church or chapel services each Sunday morning. Plaintiffs claim that these regulations are in violation of the Establishment Clause and Free Exercise Clause of the First Amendment, and constitute a religious test as a qualification to an office under the United States, in violation of Article VI of the Constitution. Plaintiff Nicholas Enna, a midshipman at the United States Naval Academy at the commencement of this action, but who has been expelled since this suit was filed, seeks additionally to have his conduct record and class standing corrected to eliminate the adverse impact on that record of the punishment and demerits he received for violation of the mandatory chapel regulations.

The hearing on plaintiffs' motion for preliminary injunction came on initially in February 1970, at which time the defendants raised the defense that the plaintiffs had failed to exhaust their administrative remedies. After three days of testimony, the Court took the matter under advisement, and on March 9, 1970 entered an Order holding that "adequate administrative procedures were and are not available to the plaintiffs and that the issue of exhaustion accordingly is not a bar to consideration of merits."

By agreement between the parties, the hearing on the preliminary injunction was consolidated with trial on the merits, and the combined hearing was resumed in April 1970, at which time the Court entered an Order allowing the action to proceed as a class action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure.

On July 31, 1970, the District Court entered an Opinion and Order denying the claim for declaratory and injunctive relief. From this Order plaintiffs appeal.

B. Statement of Facts

Every cadet and midshipman at the United States Military Academy and United States Naval Academy and every cadet in his first, second or third year at the United States Air Force Academy[2] is required to attend church or chapel services every Sunday morning. The regulations are unequivocal in their language (*e.g.*, "No cadet is exempt" . . . "All midshipmen will attend. . .") and severe penalties, including marching tours, demerits, confinement to quarters, and possible expulsion, are imposed upon violators (App. 12, 15, 19).

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[2] No explanation was ever offered for exempting seniors at the United States Air Force Academy from the mandatory chapel requirement. Presumably they are thought to be less in need of the benefits of compulsory attendance at worship than their counterparts at West Point or Annapolis.

Cadets and midshipmen are given some choice as to which worship service they will attend, but their choices are severely limited by the regulations. At West Point, a cadet must attend one of three on-campus chapel services (Catholic, Protestant or Jewish, Pl. Ex. 21, App. 138). At the Naval Academy, midshipmen may elect to attend a denominational service in the town of Annapolis (Pl. Ex. 15, App. 136), while at the United States Air Force Academy, a cadet is permitted to attend services at an "established and cooperating" church in Colorado Springs (App. 21). Any cadet or midshipman who is able to prove "beyond a reasonable doubt" to the Academy authorities that chapel attendance would be "counter-productive" for him may be excused (Tr. 79, App. 93). At the Naval Academy, there have been three cases of such excusal in the past forty years. At West Point, no cadet has ever been excused (Tr. 196, 209, February 10, 1970, App. 81, 86; Tr. 363, 374-5, April 29, 1970, App. 123, 126-7 Four cadets at West Point who sought unsuccessfully to be excused from mandatory chapel in 1969 were called "trouble makers" and were invited to resign from the Academy (Tr. 367, April 29, 1970, App. 125-6). There is no evidence of how many, if any, cadets at the Air Force Academy have ever been excused.

In determining whether a cadet or midshipman has carried his burden of proof on the issue of chapel attendance being "counter-productive" for him, it is not sufficient, in the view taken by the Department of Defense that the man may be an atheist who does not believe in a Supreme Being (Tr. 138, App. 96-7) or that mandatory attendance violates the cadet's conscience (Tr. 119, April 27, 1970, App. 96), or that he feels that compulsory chapel attendance is inhibiting his moral development (Pl. Ex. 15 and 17, App. 136-7).

The Academy regulations restrict the free transfer of cadets and midshipmen from one church or chapel service to another. A cadet desiring to change his place of attendance must first get the permission of the "sending chaplain," the "receiving chaplain" and his parents (App. 13, 15, 20). Regulation 1502(1)(a) of the Naval Academy provides that requests for transfers ". . . based on the mere personal whims of the midshipman, rather than a sincere

desire to affiliate with the stated denomination, will not be approved." (App. 15).

The evidence relating to the purpose of the compulsory chapel regulations at the Academies was highly inconsistent. Several pre-trial service publications and policy statements of the Academies stated the purpose of the regulations as being to encourage religious participation and to instill biblical faith and moral values (Pl. Ex. 39, App. 154; Pl. Ex. 10, App. 133; Pl. Ex. 30, App. 145; Pl. Ex. 32, App. 148). In the affidavits filed by the three Academy superintendents in opposition to the preliminary injunction the purpose was said to be that of fostering the qualities of honor, integrity and devotion to duty (App. 30-37).

By the time of trial, a major shift in the Department's motivation had apparently occurred, and it was stated that the *sole* purpose of requiring cadets and midshipmen to attend church or chapel is to enable them to observe the religious beliefs and practices of others. (Tr. 27, App. 93; Tr. 158, App. __; Tr. 191-2, App. 99-100).

The testimony was similarly in conflict as to the primary effect of the chapel regulations. Assistant Secretary of Defense Roger Kelley testified that "the institutional judgment of the Department of Defense" is that the primary effect is simply to enhance the cadets' understanding of the religious beliefs of others. By contrast, a variety of religious leaders, representing the gamut of the principal religious denominations in the United States testified that the primary effect, on balance, was one of devastating harm to religion in general, and to the religious lives of the individuals concerned in particular (*e.g.*, Tr. 35, App. 63-4; Tr. 84, App. 69; Tr. 95, App. 72). The uncontradicted evidence shows that compulsory attendance at worship directly violates the expressed tenets of most of the major faiths (Tr. 62-5, App. 64-6; Tr. 25, App. 62; Tr. 285, App. 115; Tr. 94, App. 72; Pl. Ex. 38, App. 153-A) and has caused very large numbers of cadets and midshipmen to become permanently alienated from religion by what they perceive as the utter hypocrisy of the theory and application of the regulations (Tr. 23, App. 61-2; Tr. 31-2,

App. 63; Tr. 82, App. 68; Tr. 205, App. 84-5; Pl. Ex. 15, App. 136; Tr. 284, App. 115; Tr. 384-5, App. 127-8).

SUMMARY OF ARGUMENT

Plaintiffs contend that the compulsory chapel regulations of the Academies violate both the Establishment Clause and the Free Exercise Clause of the First Amendment, and constitute a violation of Article VI of the Constitution.

1. Establishment Clause

Plaintiffs contend that *Everson v. Board of Education*, 330 U.S. 15 (1946) creates an absolute prohibition against governmental compulsion or punishment of church attendance or non-attendance, and once such governmental action is shown, a conclusive violation of the Establishment Clause has been made out, making it unnecessary to inquire into the purpose and primary effect of the regulations.

If the Court should, nevertheless, determine that the "purpose/primary effect" test first promulgated in *Abington School District v. Schempp*, 374 U.S. 203 (1962) is applicable, we argue that the trial Court erred in accepting uncritically the testimony of the government witnesses that the sole purpose and primary effect is to enhance the cadet's understanding of the religious belief and practices of others. We ask the Court to exercise its powers where First Amendment rights are concerned to make a *de novo* factual determination of the purpose and primary effect, in view of the abundant evidence in the record that (1) the secular purpose claimed by the government is a recent contrivance devised for the purposes of this case, and is utterly belied by official Academy publications issued shortly before the commencement of this action, and (2) whatever the purpose may be, the primary effect of the regulations is an overwhelmingly devastating one upon both religious institutions and the religious lives of a great many of the persons subjected to the requirement.

Finally, even upon taking at face value the defendant's present claim that the regulations involve using religious means to achieve a secular purpose and have a secular primary effect, we contend that the regulations are nevertheless in violation of the Establishment Clause because there is nothing in the record to show that the claimed objective of training cadets and midshipmen in the religious beliefs of others could not be achieved by non-religious means. Indeed, the unimpeached testimony of plaintiffs' witnesses is that the secular training objective could be achieved far more effectively by a course in comparative religion, which would provide exposure to a variety of religious beliefs.

2. Free Exercise Clause

Plaintiffs argue that compelled attendance at public worship is itself an infringement of plaintiffs' free exercise of religion. Additionally, the plaintiffs' freedom is unlawfully curtailed by the onerous restrictions on transferring from one church service to another, whereby a person is required to obtain the approval of his parents and the various chaplains involved before he can attend a service other than the one in which he has been "registered." Even then, he cannot attend the new church or chapel unless he can establish to the satisfaction of the authorities that he has a "sincere desire" to affiliate with a new denomination.

3. Religious Test

Although there is little judicial lore on the subject, historical analysis indicates that the ban on "religious tests" under Article VI of the Constitution refers to any sort of required ritual act or conduct indicating conformity to the prevailing religious orthodoxy. Historically, such acts have taken the form of oaths, sacrificial offerings and other gestures. Plaintiffs contend that the chapel regulations, as applied, impose an analagous kind of required behavior, the essence of which is that cadets are required to *act* as though they are

worshipping, although whether or not they are *actually* worshipping is a matter of each individual's will. A system which requires these future officers to behave as though they are worshipping, by marching to church or chapel, listening to the worship service, rising and sitting when the worshippers rise and sit, etc. is as much a "religious test" as though they were required to take communion, and is in violation of Article VI of the Constitution.

ARGUMENT

I. THE MANDATORY CHAPEL REGULATIONS VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The First Amendment of the Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The Supreme Court has had occasion to construe and apply this language several times in the past 23 years, and various guidelines have evolved for determining whether or not any given governmental practice is in violation of the mandate.

In the first and most frequently cited case construing the Establishment Clause, Justice Black set forth its *minimum* scope as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or remain away from church* against his will or force him to profess a belief or disbelief in any religion. *No person can be punished for* entertaining or professing religious beliefs or disbeliefs, for *church attendance or non-attendance.* **** Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to 'erect a wall of separation between church and state'."

> *Everson v. Board of Education*, 330 U.S. 15, 16 (1946)[3] (emphasis added).

This quotation from *Everson* has been repeated and reaffirmed in several subsequent cases. *McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1947); *McGowan v. Maryland*, 366 U.S. 420, 443 (1960); and *Torcaso v. Watkins*, 367 U.S. 488, 492-3 (1960).

We think that the Supreme Court in *Everson* intended to set forth certain categories of absolutely proscribed conduct. Thus, the federal government cannot, for example, require a person to profess a belief in the divinity of Christ, regardless of what secular purpose or effect might be involved. The clear message of *Everson* is that certain limited areas, such as profession of religious belief and attendance at worship are so sensitive, so deeply personal, and so inherently relegated to individual conscience that the state cannot under any circumstances lawfully seek to compel individual conduct.

During the early 1960's, the school prayer and bible reading cases brought about the realization that the *Everson* language was not sufficiently precise to evaluate some more ambiguous forms of possible "establishment," and the Court promulgated a more specific two-fold test for analyzing those governmental practices which did not fall clearly into the category of practices prohibited by *Everson*. This test, sometimes known as the "purpose/primary effect" test, was first articulated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1962).

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a

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[3] Curiously, the trial Court's 25 page opinion contains not a single reference to *Everson*.

> primary effect that neither advances nor inhibits religion."
> (citations omitted)

Plaintiffs contend that the present case is governed by the clear and unambiguous prohibition of *Everson*, and it is therefore unnecessary to resort to the "purpose/primary effect" test. There can be no doubt whatsoever that the compulsory chapel regulations of the Military Academies "force or influence" cadets and midshipmen to go to church or chapel, under penalty of severe disciplinary action. Since this is so, it is unnecessary for the Court to determine the purpose and primary effect of the regulations. It is significant that in setting forth the purpose/primary effect test in *Schempp*, *supra*, Justice Clark cited *Everson* and *McGowan* as authorities for these criteria, thus indicating that the new criteria were intended to supplement, and not replace, the prohibitions in those cases. The purpose/primary effect test thus operates as a corollary to the *Everson* prohibition, for measuring those borderline practices not expressly proscribed in *Everson*.

This position is no way inconsistent with the dicta in some Supreme Court cases about "room for play in the joints" and the impossibility of absolute or perfect separation between Church and State, *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Walz v. Tax Commissioner*, 397 U.S. 664, 669 (1970). Admittedly, as the Supreme Court has found, there are some gray areas of inevitable overlap between the respective realms, and in those areas it is necessary to make fine distinctions, based upon inquiry into the purpose and primary effect of the state's involvement. Whatever aspects of society those marginal areas may include, freedom of worship is not among them. Where church attendance or worship itself are concerned, the bar against governmental interference is, and should be, absolute.

If this Court should, nevertheless, feel obliged to resort to the purpose/primary effect test, we submit that the compulsory chapel regulations have *both* a purpose *and* a primary effect which "advances or inhibits religion."

The Court below found as a fact that the chapel regulations have a wholly secular purpose and primary effect. Since First Amendment rights are involved, this Court is not bound by those findings, and is free to make its own factual determination on these issues based upon an independent *de novo* examination of the record. *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963); *Fiske v. Kansas*, 274 U.S. 380, 385-6 (1927); *Rosenbloom v. Metro Media Inc.*, 415 F.2d 892 (3d. Cir., 1969); *Baldine v. Sharon Herald Co.*, 391 F.2d 703, 706 (3d. Cir., 1968).

In any event, we contend that the Court's findings with respect to the purpose and primary effect of the regulations are contrary to the overwhelming weight of the evidence, and are plainly erroneous.

A. The Compulsory Chapel Regulations Have a Purpose Which Advances Religion

In an attempt to qualify the compulsory chapel regulations as having a secular purpose, the Assistant Secretary of Defense and the Chairman of the Joint Chiefs of Staff testified that the *sole* purpose of the compulsory chapel regulations is to train more effective officers by providing the cadets and midshipmen with an understanding of the religious beliefs and practices of *others*. (Tr. 27, 158, 191, 192; April 27-28, 1970, App. 93, 99-100). Taken by itself, this rather improbable testimony raises rather serious moral and legal questions about the use of religion as a tool or training aid to accomplish secular purposes. Taken in the context of the very considerable contrary evidence in the record, this testimony must be regarded as nothing more nor less than a recent contrivance devised for purposes of defending this case, and raises grave and very disturbing doubts about the integrity and credibility of the government witnesses through whom it was presented.

The record contains several Academy publications which describe the purpose of the compulsory chapel regulations as being to strengthen the religious

faith and convictions of the Academy students. It is clear from an analysis of these documents, together with the testimony of the government witnesses, that the government's position that the sole purpose is to enable cadets and midshipmen to observe others at worship is as demonstrably false as it is patently absurd.

The earliest version of the West Point compulsory chapel regulations (App. ____; Ex. 1 to Opposition to Motion for Preliminary Injunction) illustrates that as early as 1821 the compulsory chapel regulations were designed to serve a clearly religious purpose. Any cadet who behaved "indecently or irreverently while attending divine service," or who "profane(d) the Sabbath" was subject to dismissal from the Academy.

The government concedes that the compulsory chapel regulations "have roots and practices designed to further religion," but argues that the present day purpose is wholly secular. This argument, however, is belied by the government's own documents.

In 1968, Lieut. (then Cadet) Robert L. Leslie sought excusal from chapel, and after several unsuccessful requests at various levels within the Academy, obtained an interview with the Inspector General of the Army. He was given a document entitled "Cadet Chapel Services – Statement of Policy," which describes the purpose of compulsory chapel as follows:

> "United States Military Academy accepts responsibility for the total development of the Cadet: mental, physical, moral and spiritual. *In recognition of* this responsibility, *the fact that Biblical faith is the foundation stone of honor and integrity,* and the necessity for every officer to have a first-hand knowledge of one of the three great religious traditions of our country, the Academy requires all Cadets to attend Protestant, Catholic or Jewish chapel on Sunday." (emphasis added) (Pl. Ex. 39, App. 154).

In the spring of 1969, the Superintendents of the Military Academies met in conference at Annapolis, and issued a position paper entitled "Chapel Attendance," containing the following statement of purpose:

> "It is the consensus of the four Superintendents that *the purpose of regular attendance at religious services is to instill a sense of respect for religion* as a factor in the daily lives and activities of the vast majority of mankind." (emphasis added) (Pl. Ex. 10, App. 133).

The catalog of the U.S. Naval Academy states the purpose of compulsory chapel as follows:

> "Because we are 'one nation under God,' it is most appropriate that the Midshipmen who will someday become the leaders of our Navy should regularly attend divine worship services." (Pl. Ex. 30, App. 145).

The catalog of the U.S. Military Academy at West Point deals with the subject as follows:

> "Religious Activities. All Cadets are provided a sound basic religious atmosphere. Each Cadet must attend one of the weekly chapel services – Protestant, Catholic or Jewish." (Pl. Ex. 32, App. 148).

The above documents (none of which are mentioned in the trial Court's opinion) reflect the government's stated policy and purpose immediately prior to the filing of this action. The stated purpose in all of these most recent Academy publications was to enhance the students' religious orientation – a purpose which indisputably "aids" religion. Upon the filing of this suit, the first of two dramatic shifts in "purpose" occurred. The three Academy superintendents filed affidavits in opposition to plaintiffs' motion for preliminary injunction stating a significantly different purpose. In these affidavits (App. 30, 33, 37) the aim of compulsory chapel is described as being to build moral character – to infuse those qualities of integrity, loyalty and dedication to duty required of a good officer.

> "Because a genuine sense of honor, devotion to duty, and absolute integrity are qualities demanded of an officer, chapel attendance is used as a valuable educational tool to foster those qualities." (Affidavit of Thomas S. Moorman, Lieut. Gen. USAF, Superintendent of the U.S. Air Force Academy, App. 37).

The Superintendents, in these affidavits, shifted the alleged purpose of mandatory chapel from the blatantly unconstitutional aim of strengthening religious attitudes to the quasi-religious objective of building character.

In his Affidavit explaining the nature and purpose of the compulsory chapel regulations at the Naval Academy, Rear Admiral James Calvert, Superintendent of the Academy, refers to Title 10, U.S. Code §6031, which states, in part: ". . . Commanders of vessels in naval activities to which chaplains are attached shall cause divine services to be performed on Sunday . . . and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God." The Admiral also refers to U.S. Navy Regulations, Article 0711, which states, in part: ". . . The religious tendencies of individuals shall be recognized and encouraged." Admiral Calvert describes the purpose of the regulations as being to foster in the midshipman "a genuine sense of honor, devotion to duty and absolute integrity," and to permit the midshipman to "continue his growth in the faith of his choice . . ." A primary objective is stated to be ". . . the development of sound moral character."

In the two month interval between the filing of these affidavits in February and the trial in April, a second and still more dramatic and unexpected shift occurred. Apparently concluding that character-building was likely to be considered a "religious purpose" as a matter of law (*cf. Schempp, supra,* 374 U.S. at 280), the defendants at trial completely disavowed all earlier statements of purpose and claimed that the *sole* purpose of the mandatory chapel regulations was ". . . to help the midshipmen and cadets understand the basis of religious belief and practice on the part of other mideshipmen and cadets and thus equip him for positions of leadership responsibility in later service life." (Tr. 27, App. 93).

In the light of the earlier documents and affidavits, the testimony of Assistant Secretary of Defense Kelley and Admiral Moorer that the sole purpose of the chapel regulations is to enable the cadets and midshipmen to

understand the religious beliefs of *others* is simply incredible. But it is not necessary to refer back to these documents to contradict the witnesses, for their testimony is sharply contradicted by their own answers under cross-examination.

Assistant Secretary of Defense Kelley, when asked about the policy statement of the Conference of Superintendents, described the document as "a statement which reaffirmed the purpose underlying the requirement to attend chapel services . . ." (Tr. 116, April 27, 1970, App. 95). The purpose stated in the Superintendents' policy paper, of course, is: "To instill a sense of respect for religion . . ." (Pl. Ex. 10, App. 133).

Equally telling was Admiral Moorer's admission, under cross-examination, that the purpose of compulsory chapel attendance at the Academies is to provide a sound, basic religious atmosphere for the cadets and midshipmen (Tr. 237, App. 107), and his subsequent admission that the Naval Academy policies are intended to comply with the mandate of Article 0711 of the Naval Regulations in recognizing and encouraging the religious tendencies of individuals. (Tr. 266, April 28, 1970).

Any remaining doubt as to the religious purpose of the Academies' chapel policy was removed by the statement of the Chairman of the Joint Chiefs of Staff that an atheist cannot hope to become a great military leader. (Tr. 208, App. 101). While a great many notable exceptions to this remarkable generalization come to mind (Hannibal, Julius Caesar, Alexander the Great, the "god-less Communists" of the present day Soviet Union, etc.) this statement, coupled with the Admiral's earlier statements that (a) the Academy graduates serve as a "bench mark" for the officer corps of the three services (Tr. 186, April 28, 1970); App. 99); and (b) ROTC and Reserve Officers would make "much better officers had they been required to go to church" (Tr. 207, App. 101); strongly indicates that the true purpose underlying the compulsory chapel policy is to instill and nourish religious beliefs and values.

We think it extremely significant that the government declined to put forward any chaplains, from the Academies or elsewhere, as witnesses, and we suggest that this omission was not accidental. Is it conceivable that any Academy Chaplain would agree that chapel policies are intended to serve a "wholly secular purpose?" Is it conceivable that any minister of God would adopt the statement of Admiral Moorer that the sole purpose of the chapel policies is to furnish the cadets and midshipmen with an understanding of the religious beliefs of *others*? We think not.

Although no Academy Chaplains testified in Court, their views are to be found in the record, and they support the plaintiffs' position that the purpose of the chapel regulations is a religious one.

Midshipman Thomas L. Travis testified as to his several efforts to be excused from chapel, and submitted a copy of the recommendation he filed for revision of the chapel/church party system. (Tr. 399-419, Feb. 12, 1970, App. 140). His proposal (Pl. Ex. 22, App. 140) suggested that insofar as the objective of compulsory chapel is to furnish midshipmen with an understanding of the religious practices and beliefs of persons of different faiths, that objective could be most effectively achieved by a course in comparative religion.

In rejecting Midshipman Travis' proposal, Chaplain Robert L. McComas, the Senior Chaplain of the Naval Academy, pointed out that such a course was inadequate to achieve the basic objective, which is the attainment of religious maturity. "Worship is something entirely different from the study of other religions – it is the heart and guts of the practice of your own. It is essential to religious maturity." (Pl. Ex. 24, App. 142).

Similarly, Chaplain David W. Plank, the Commander of the Chaplain Corps of the U.S. Navy, in his sermon at the Protestant Chapel at the Naval Academy on April 5, 1970, stated quite candidly, with specific reference to this lawsuit, that the aim of the chapel regulations is to enhance the midshipmen's religious ties.

"Midshipman Jones . . . officer. Midshipman Jones . . . disciple. The profile of your career is two-storied as the sermon title shows and as this beautiful tiffany window so dramatically portrays. As a man in uniform you are duty-bound to country, and to her call. As a man created in the divine image for sonship, you are duty-bound to God, and to his sovereign summons. *The fact that Sunday chapel attendance is obligatory for the man at Annapolis . . . and that this policy is now being defended in Washington, is testimony to the belief that each of you has this dual allegiance and that one reinforces the other.*

* * * *

"Christ is still calling today: Follow me Midshipman Jones! He is still inviting men to be disciples. You have enlisted in one service. Will you now actively enlist in his?" (emphasis added) (Pl. Ex. 33, pp. 3-4, App. 150-153).

Finally, the clearly religious nature and purpose of the chapel regulations may be gleaned from perusal of the regulations themselves.

Air Force Cadet Regulation 265-1 (Attachment C to Plaintiff's Motion for Temporary Restraining Order, filed 1/23/70, App. 19-28) describes the purpose of the chapel regulations as being two-fold:

"This regulation outlines the policy governing cadet participation in chapel services and religious activities: to make it possible for a Cadet to develop his religious experience in the church in which he was reared and to permit the Cadet to understand the religious responsibility held by an Air Force officer in the assumption of leadership of those under his command."

The Regulation goes on to define the spiritual objectives of the chapel policies as follows:

"1(b). Because a genuine sense of honor, devotion to duty, and absolute integrity are qualities demanded of an officer, and because these qualities are fostered in religious principles and traditions, the Academy requires Cadets to attend Catholic, Jewish or Protestant religious services – expressions of the three great faiths of Western civilization. The Academy's religious program

> fosters an atmosphere and provides instruction which together help develop moral strength and integrity of the future officer. Further, the program provides a Cadet opportunities for growth in the faith in which he was reared, and it leads him to understand the religious responsibilities of an officer who will command men of many faiths. * * * *
>
> 2(b). Cadets are encouraged to participate in related religious services and activities to further their training in the faith of their choice."

The Naval Academy's "Requirements Concerning Religious Matters" (Attachment B to Motion for Temporary Restraining Order, App. 15-18) are perhaps the most far-reaching. Worship services are held not only on Sundays, but each morning at breakfast, as well.

> "Regulation 1501(d). Prayers will be offered in the Midshipmen Dining Hall immediately before breakfast each morning except Sunday, and a short period of silence for individual prayer will be observed at other meals."

This latter provision, we think, sheds grave doubt on the defendants' ingenious by disingenuous and often-repeated assertion that cadets and midshipmen are required only to attend chapel services, but not to worship. Apparently, midshipmen at the Naval Academy are required to offer prayers each week-day morning in the dining hall, but not in chapel on Sunday!

We cannot omit from this consideration of the Academy regulations the stringent restrictions at all three Academies on transferring from one chapel or church to another. At West Point and at the Air Force Academy, a cadet desiring to change must secure the approval of the "sending Chaplain" and the "receiving chaplain" and of his parents [U.S. Military Academy Regulation 823, Attachment A to Motion for Temporary Restraining Order; U.S. Air Force Academy Regulation 265-1, §1(b)(3), App. 13, 20], and at the Naval Academy, the Senior Chaplain [Regulations of the U.S. Naval Academy, §1502 (1)(a), App. 15]. Such restrictions, we think, are scarcely consistent with the "wholly secular purpose" claim of the defendants. It is quite apparent

that if the "sole purpose" of the compulsory chapel regulations were to furnish an opportunity for observing others at worship, as claimed, that purpose could as readily be achieved at one chapel service as another.

We conclude this discussion of "purpose" with a reference to the Affidavits filed as Attachments to the Opposition to Motion for Preliminary Injunction, in which all three academy superintendents stress as the basic objective of compulsory chapel the inculcation of the spiritual qualities of sound morals, integrity, loyalty, dedication to duty, etc. Putting to one side the complete reversal of position taken at the April hearing, in which the sole purpose was now stated to be the development of an understanding of the religious beliefs of others, and taking the superintendents' affidavits at face value, we note that the Supreme Court has declared that the development of such moral and spiritual values is a "religious purpose" as a matter of law. These same kinds of allegedly secular purposes were raised in the school prayer and bible reading cases, and were held unlawful. In disposing of this argument, Justice Brennan observed that:

> ". . . [M]uch has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom. To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause." *Schempp*, 374 U.S. at 280.

B. The Compulsory Chapel Regulations Have A Primary Effect Which In Some Ways Advances, And In Other Ways Inhibits, Religion

1. Favorable Effects

In some ways, and for some individuals, the record indicates that the compulsory chapel regulations have a beneficial effect on religious attitudes and convictions – and hence on religion itself.

"It seemed to me to be a mixed effect. To some of these young men, the requirement had played a supportive role in their religious lives. By and large these young men who were conventional in their approach to life, who liked the services at the Academy and felt that this had done them good." (Testimony of Rev. Glyn Jones, Tr. 23, Feb. 9, 1970, App. 61-2).

* * * *

"Q. And when the academy not only makes chapel available, but requires the midshipmen to attend, does that have the effect of encouraging his religious tendencies?

A. Well, I think a midshipman who attends, initially, and who has been raised by a family who did not require their children to go to church, might receive from the service, some inspiration, some motivation of his beliefs that would create in him a desire to be more active in the church. That's a possibility, and the answer to that part of your question is yes." (Testimony of Adm. Moorer, Tr. 268, April 28, 1970, App. 111-12).

Apart from their effect upon various individuals, the chapel regulations have the perhaps inevitable effect of preferring, and thereby aiding, certain religions over others. At West Point, all cadets are required to attend one of the three on-campus chapels – Catholic, Protestant or Jewish. Lieut. David Vaught, who was forced to attend the Protestant Chapel during his four years at West Point, testified that the type of services held in that chapel – apparently Episcopalian – were in conflict with the beliefs and practices of his own Southern Baptist denomination. (Tr. 159, 167-8, App. 77, 79). To the extent to which the Protestant Chapel services at West Point, or at the other Academies, adhere to the form of one denomination at the expense of another, they violate the *Everson* prohibition that "neither a state nor the federal government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson, supra,* at 15. This element of unconstitutional preferential treatment is found not only within the confines of the chapel services, but – more seriously perhaps – in the limitations on which chapel or church service a cadet or midshipman may attend.

The U.S. Air Force Academy Regulation 265-1, ¶3(d)(1), provides as follows:

> "(1) Off-Base Church Attendance: Second Classmen desiring to attend a Sunday/Sabbath church service of their own denomination in the Colorado Springs area, in lieu of the Cadet Chapel Services, may submit a written request through their Squadron AOC and the Deputy Commandant for the Cadet Wing (final approving authority) to the Senior Cadet Chaplain . . . *The church must be an established and cooperating Colorado Springs church as approved by the Senior Cadet Chaplain. . .*" (emphasis added) (App. 21).

It is difficult to imagine a clearer violation of the proscription against "preferring one religion over another" than this. By what conceivable justification can an agency of the U.S. Government limit the place of worship of a cadet to an "established" church? And how long must a church survive to meet the requirement of being "established?" More flagrant, perhaps, is the requirement that the church "cooperate" with the Academy. As we shall see, these restrictions are of great import to the violation of the Free Exercise Clause. For the moment, it is sufficient to point out that to the extent that cadets are limited to worshipping in "established and cooperating churches," those denominations are being unconstitutionally aided and preferred.

The Naval Academy Regulation is similarly discriminatory. For some unexplained reason, midshipmen are permitted to request transfer from denominational churches in Annapolis to a Naval Academy chapel at any time during the academic year, but can transfer from the Academy chapels to a denominational church in town only at the beginning of the academic year, thereby favoring the chapel services over the denominational services.

2. Negative Effects

Unquestionably more serious and far-reaching than the aforementioned favorable effects, however, are the devastating negative effects which compulsory

chapel has upon religion. This negative impact is seen to take two basic forms: a corrosive effect on the religious attitudes of the men who are subjected to the requirements; and a multi-faceted violation of some of the most fundamental tenets of the major religious denominations in this country.

(a). The Effect on the Church

The record abounds with uncontradicted testimony and documentary evidence reflecting the hostility, bordering on outrage, of religious leaders to the compulsory chapel regulations. Reverend Glyn Jones, a Baptist minister with over 23 years of service as a Navy chaplain, described the Academy policy as "sacriligious and blasphemous." (Tr. 35, App. 63-4). Father Robert Drinan Dean of Boston College Law School and a Jesuit priest, characterized the compulsory chapel regulation as "offensive, sacriligious and a desecration of religion." (Tr. 65, App. 65). Rabbi Eugene Lipman, Rabbi of Temple Sinai in Washington, Lecturer in Judaism at Catholic University of America, and a former chaplain, found the requirement ". . . totally offensive. It makes a mockery of public worship." (Tr. 95, App. 72).

It is clear, moreover, that in thus describing the compulsory chapel regulations, these distinguished clergymen were not stating merely their own personal opinions, but the opinions of virtually all the major religious bodies in this country. The record indicates that compulsory chapel or church attendance violates the principles and doctrines of the following faiths: Catholic Church (Vatican II) (Tr. 62-5, App. 64-5); American Baptist Church (Tr. 25; Tr. 285, April 28, 1970, App. 62, 115); Judaism (Tr. 94, App. 72); United Presbyterian Church (Pl. Ex. 38, pp. 36, 44; App. 153-A); and United Methodist Church (Pl. Ex. 38, p. 53, App. 153-A). In addition, the General Commission on Chaplains, an organization composed of 35 Protestant denominations, which furnishes 95% of the Protestant chaplains to the armed forces, in 1964 adopted a resolution flatly condemning the policy of compulsory chapel attendance. (Pl. Ex. 38, p. 22, App. 153-A; Tr. 278-81, April 28, 1970, App. 278). There is no

evidence in the record that compulsory chapel attendance is favored by any religious faith or denomination.[4]

There are several reasons for this widespread and vigorous opposition to compulsory chapel within the ranks of organized religion. Perhaps the most basic of these is that compulsory worship is itself a contradiction in terms. Worship, by its very nature, must be free, and if coerced, it is no longer truly worship. (Tr. 94, 95 App. 72). A closely related factor is the inhibiting effect on the rest of the congregation of having a number of sleeping or magazine-reading (Tr. 253, Feb. 10, 1970, App. 87) outsiders attending services without participating (Tr. 84). The result of such a situation can only be – in the words of Reverend Earl Brill – to "inhibit the free expression of religious conviction" on the part of the worshipping congregation.

It is paradoxical that the defendants' striving to circumvent the Establishment Clause by attributing to the compulsory chapel regulations a wholly secular purpose has resulted in the policy having a devastating adverse effect upon religion – an effect which flows largely from the defendants' own purpose! It is precisely the utilization of religious worship to achieve a secular purpose which the clergymen and the religious bodies they represent find so offensive.

By their own admission, the defendants are "using" church for their own secular ends. Sacred worship is being used as a training aid. As Admiral Moorer expressed it, ". . . The whole objective (is one) of *utilizing the church* to assist in broadening the training of the midshipmen." (Tr. 253, April 28, 1970, App. 108).

It is precisely such a mis-use of religion that the Establishment Clause was intended to prevent. As the Supreme Court said in *Engel v. Vitale, supra:*

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[4] Despite all of the uncontradicted evidence and, indeed, without mentioning any of it, the trial Court found as a fact that the compulsory chapel regulations have no inhibiting or hostile effect upon religion. (App. 54-5).

> "The Establishment Clause thus stands as an expression of principle on the part of the founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel, supra*, at 431-2.

Reducing worship services to an educational tool cannot but be harmful to the church, as well as to those engaged in worship. Worship, ". . . is not an educational experience; it is a liturgical experience, which is something quite different." (Tr. 85, App. 69-70). The negative impact upon the religious body of compulsory chapel attendance was most eloquently expressed by The Reverend Dean Kelly, of the National Council of Churches as follows:

> "Worship is not a spectator sport. It is engaged in by a worshipping congregation. Great care is taken in instruction on this subject not to refer to the participating body, the worshipping body, as an audience. It is a congregation and the assumption is that every person present is participating.
>
> * * * *
>
> I can think of nothing more deleterious to the worshipping experience to those seeking to worship than the presence of an apathetic observing group who, though they may sit and stand, do not repeat the prayers or sing the hymns. That would have a chilling effect, I should think, upon the effort of worship of the worshipping congregation." (Tr. 336-7, April 29, 1970, App. 118-19).

It is not surprising, in light of the foregoing, that the Protestant denominations have experienced difficulty in recruiting chaplains as a result of the compulsory chapel regulations of the Academies. (Tr. 282, App. 114). The sum and substance of all of this evidence, plaintiffs suggest, is to demonstrate the validity of the basic rationale of the Establishment Clause, as concisely stated by Justice Black in *Engel:* "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel, supra*, at 431.

(b). The Effect on Religious Attitudes of Individuals

The most readily provable and perhaps the most serious harm to religion resulting from the Academy compulsory chapel regulations is the widespread resentment, hostility and cynicism[5] toward religion engendered in the cadets and midshipmen who are subjected to the chapel requirement. The record in this case abounds with evidence of this fact, drawn from a variety of sources, including present and former cadets and midshipmen, clergymen, chaplains, and a psychiatrist.

Paraphrasing cannot do justice to the depth and pervasiveness of the effect of compulsory chapel on the religious attitudes of these men and others whom they observed and we prefer to let the transcript on this point speak for itself.

Reverend Glyn Jones — Career Navy Chaplain, Ret.

> "A larger number of the young men with whom I dealt had quite a different experience. Their end feeling was one of very strong hostility toward formal religion as a consequence of their compulsion in the service academies. Many of them who became personally friendly with me, nevertheless, stood on their rights to have nothing to do with formal religion as a means of protest against this system to which they had been subjected for four years." (Tr. 23).

> "[On the basis of conversations with several hundred to a thousand Academy graduates over a course of fifteen to twenty years,] I found among many senior officers a continuing hostility to the requirement of having had to go to chapel at the Academy. I found, on the other hand, that the feelings of

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[5] It is hard to imagine that any emotion other than cynicism can be evoked in a cadet who is forced to go to chapel when he recites the official Cadet Prayer, which begins: "O God, Our Father, Thou searcher of men's hearts, help us to draw near to Thee in sincerity and in truth. May our religion be filled with gladness and our worship of Thee be natural. Suffer our hatred of hypocrisy and pretense never to diminish." (Tr. 210, Feb. 10, 1970, App. 86).

many had been mellowed by nostalgia. They had many stories of ways in which they had escaped the requirement while they attended the Academy and told these as if this were an entirely proper thing for Midshipmen to do." (Tr. 31-32; Feb. 9, 1970, App. 63).

Reverend Earl Brill – Chaplain and Lecturer at American University

"For those who do not share the convictions of the religious community where they are asked to attend worship, I think it would produce a real strain on a man's integrity, because, on the one hand, he is asked to attend, and on the other hand, he is not asked to make any expression of conviction. This puts him in the position of going through motions in which he has no personal investment. I would think this would produce a serious strain on a man's sensitivity and integrity and put a premium on the kind of individual who is willing to observe the externals, but is not willing to raise fundamental issues of meaning and purpose.

This encourages playing a game rather than being truly religious or truly moral." (Tr. 82, Feb. 9, 1970, App. 68).

Cadet 1st Class Michael B. Anderson, U.S. Military Academy

"Since coming to the Military Academy, the mandatory chapel regulation has so violated my sense of propriety that I feel an obligation to my personal integrity to take every opportunity to avoid going to the mandatory chapel services, either within or outside of the Regulations of the U.S. Corps of Cadets, so long as there was no violation of the Honor Code of the U.S. Corps of Cadets." (Tr. 205, Feb. 10, 1970, App. 84-5).

Dr. Angelo D'Agostino – Jesuit Priest and Professor of Psychiatry at George Washington University

"[Compulsory chapel attendance] would definitely retard the religious development [of certain persons]." (Tr. 394, Feb. 11, 1970, App. 90).

Lieut. (formerly Cadet) David Vaught, in his unsuccessful excusal application, dated November 21, 1968:

> "The very fact that people have to be coerced to attend it, makes it distasteful to me and causes me to be turned against religion and religous people because of their hypocrisy in forcing others to attend their services." (Pl. Ex. 15, App. 136).

Reverend Ray Applequist – former Army Chaplain and Executive Secretary of the General Commission on Chaplains, on discussing mandatory chapel with West Point graduates:

> "They said to me in very explicit terms, that they were adversely affected by the experience; as one in particular put it, 'having religion rammed down my throat for my four years at the Point'." (Tr. 284, April 28, 1970, App. 115)

Lieut. (former Cadet) Robert Leslie

> "Q. And to the best of your recollection, approximately how many Cadets did you have occasion to discuss this subject with during your four years at the Academy?
>
> A. I would say at least 80 or 90.
>
> Q. And from those conversations were you able to determine what effect, if any, the mandatory chapel requirement was having on them?
>
> A. It seemed to me to have an effect that was not something nice to see. The individuals had attitudes toward religion that changed. The ones that I knew when I first came in, came in, well, as a normal group of population, some strongly religious and some not at all; but as time went on the attitudes seemed to indicate more and more that they were being pushed away from religion, becoming contemptuous of it. They thought that the chapel was a farce, that it was just another ceremony. You wore your full dress uniform to parade on Saturday for the people. You wore your full dress uniform to march up to chapel on Sunday, and if you didn't wear that uniform, you were hidden way up in the balcony.

> They felt it pretty apparent that the reasons for having mandatory chapel were pretty shabby, and a lot of them didn't like it.
>
> . . . the general feeling was one of revulsion toward this type of religious experience." (Tr. 384-5, April 29, 1970, App. 128).

The pattern of pervasive alienation from religion resulting from mandatory chapel is graphically illustrated by the chapel survey conducted by Lieut. (formerly Cadet) Fred Van Atta at West Point in 1968, for his class in military psychology and leadership. The results of that study (Pl. Ex. 41, App. 156),[6] are most revealing:

> Nearly 50% of all 1st Class and 2nd Class Cadets pay attention at chapel "rarely or never."
>
> The overwhelming majority of Cadets in all Classes feel chapel services should not be mandatory.
>
> Approximately 50% of all 1st Class (senior) Cadets have managed to "skip" chapel services by their senior year, despite serious penalties in the event of being caught.
>
> *The percentage of Protestant Cadets who do not attend chapel when away from West Point rises, over the four years, from 14% of 4th Classmen, to 65% of 1st Classmen.*

There is nothing novel in the proposition that compulsory religion engenders hostility in the person compelled. "The history of governmentally established religion, both in England and this country, shows that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith." *Engel, supra,* at 431.

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6 Plaintiffs' Ex. 41, containing the results of the chapel survey, was not admitted into evidence. Plaintiffs contend (pp. 47-9, *infra*) that this exclusion was improper.

Admittedly, not all cadets and midshipmen are "turned off" from religion by the chapel policy. The government claims that in most cases that policy has the effect of strengthening the future officer's religious ties. (Tr. 268, 270-1, April 28, 1970, App. 112). Although this claim is probably exaggerated, since there is evidence that the majority of officers do not go to church (Tr. 284, 289, App. 115-16), it does not matter for constitutional purposes whether the positive or negative effect is more widespread. *Either* effect violates the purpose of the Establishment Clause.

> "In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster *or* discourage religious worship or belief." (emphasis added) *Schempp*, 374 U.S. at 234.

> "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non religion, and that it work deterrence of no religious belief." *Schempp*, 374 U.S. at 305; reaffirmed by Harlan, Jr. in *Walz v. Tax Commn.*, 397 U.S. 664, May 5, 1970, concurring opinion of Harlan, J., Slip Opinion, p. 2.

> "This legislation [tax exemption] neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment." *Walz, supra*, concurring opinion of Harlan, J., p. 3.

The trial Court's discussion of "primary effect" occupies two pages of its Opinion (App. 52-3), most of which consists of quoting from the testimony of Assistant Secretary Kelley and Admiral Moorer. The Court dismisses the testimony of all of the above quoted plaintiffs' witnesses as follows: "The plaintiffs failed . . . to demonstrate that the [negative] effect is anything but slight, insubstantial, and non-extensive" (App. 53-4), and later, "the effect of attendance is no different than the effect of other regulations which all blend together to mold the future officer." (App. 54). These conclusions, we

submit, are plainly erroneous. The Court in a footnote buttresses its finding by referring to the alleged excusal provisions, totally ignoring the evidence (pages 40-42, *infra*) that these provisions, as applied, are little more than a sham.

As has been pointed out earlier, (pp. 12-17, *supra*) the government has wholly retreated from its initial position that the purpose and primary effect of compulsory chapel is to build character by inculcating integrity, loyalty and dedication to duty. We suspect that one reason for this abrupt change of position is that the evidence indicates that compulsory chapel has precisely the opposite effect. The testimony of the clergymen and others indicates that compulsory chapel is most frequently counter-productive in terms of any kind of character building. (Tr. 35, 82, 84, 97, 205, 376-7, 394, App. 64, 68-9, 73, 84-5, 89-90). Character is developed by expanding the capacity to use one's will. Loyalty and dedication are not built by coercion.

One must conclude from the record that the compulsory chapel regulations have a highly deleterious effect on the development of integrity. Contrariwise, hypocrisy and evasion are the traits which are in fact encouraged. Cadets and midshipmen soon learn that the impressive chapel services, with all the fancy ceremonial trappings of a century of tradition, are primarily a "show" put on for the benefit of observers. As one former West Pointer put it:

> ". . . They [the Cadets] thought that the chapel was a farce, that it was just another ceremony. You wore your full dress uniform to parade on Saturday for the people. You wore your full dress uniform to march up to chapel on Sunday, and if you didn't wear that uniform, you were hidden way up in the balcony." (Tr. 385, April 29, 1970, App. 128).[7]

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[7] It appears that the U.S. Military Academy at West Point is not the only military academy whose undergraduates feel it is overly concerned with appearance, where chapel is concerned. A recent letter to the Editor in the April 28th, 1970 *Annapolis Evening Capital* contained the following statement: "One may generalize and say that most Midshipmen feel that chapel is automatically preached to the guests without due concern given to the problems of a modern Midshipman, and that it will continue to be this way as long as the Academy is concerned with an image rather than a reality."

Hand in hand with the realization of the hypocrisy of the ceremony, comes the urge to evasion. By the time of their senior year, approximately half of the cadets have "skipped" chapel services. (Pl. Ex. 41, App. 156).[8] Attempts at evasion of the chapel requirements – the very antithesis of integrity – are not confined to West Point. According to Admiral Moorer, unlawful skipping of chapel was common during his days as a midshipman. "Frequently, they chose to slip out, and frequently they were caught, and frequently they suffered the consequences." (Tr. 242, April 28, 1970, App. 108).

Just as mandatory chapel is counter-productive to any kind of positive character building, so is it equally ineffective for achieving the newly-urged purpose of educating future officers as to the religious beliefs and traditions of others. The only evidence on the content of Academy chapel services indicates that no significant amount of information relative to the religious traditions of this country is imparted, nor is there any instruction given in ministering to the religious needs of soldiers. (Tr. 207, Feb. 10, 1970, App. 85).

The trial Court took judicial notice of the fact that all religious services are designed to evoke religious fervor in those people who attend, (Tr. 274, App. 113), and it is clear from an examination of Exhibits 10 and 33 (App. 133, 150, that Academy chapel services are no exception. These Exhibits leave little doubt but that when one attends a chapel service, he is attending a worship service, in which he is repeatedly urged to make or reaffirm his commitment to God. The content and atmosphere of such services are – to say the least – inappropriate for an educational exercise.

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[8] See footnote 6, *supra*, p. 29).

C. The Academies Are Using Religious Means To Achieve Governmental Ends, Where Secular Means Would Suffice

The Supreme Court has ruled that a governmental practice which has both a secular purpose and a secular primary effect may, nevertheless, be in violation of the Establishment Clause if it involves the use of religious means to achieve secular goals, where non-religious means would suffice.

> ". . . [T]he teaching of both *Torcaso* and the *Sunday Law Cases* is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *Schempp, supra,* 374 U.S. at 265; *accord, Walz v. Tax Commission, supra,* Concurring Opinion of Brennan, Jr., Slip Opinion, p. 1

If the goal of compulsory chapel is, as the government claims, to broaden the training of cadets and midshipmen by acquainting them with the religious beliefs and practices of others, the government has grossly failed in its burden of furnishing the "clearest demonstration that non-religious means would not suffice."

The overwhelming evidence in this case, on the contrary, is that the classroom is a far more suitable place than the church or chapel to achieve this educational objective. The government has not made any serious attempt to challenge the testimony of Rev. Earl Brill, a theologian and educator, whose field of expertise is the role of religion in higher education, that, "The teaching of religion in a classroom is a much more effective way of understanding a pluralistic religious tradition such as ours." (Tr. 87, Feb. 9, 1970 (App. 71).). Chapel attendance, according to Rev. Brill, is "The least adequate way of developing this understanding." (Tr. 83, Feb. 9, 1970, App. 68).[9]

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[9] Further evidence that formal classes are a better medium for achieving the Academies' training objectives is to be found in the Report of the United Presbyterian Church in the United States of

(continued)

A basic flaw in the government's position is that a cadet or midshipman who attends church services in the faith in which he was reared for four years learns nothing about the religious principles and values of anyone but members of his own faith. We find Secretary Kelley's answer to this argument distinctly unconvincing:

> "Q. . . . How does going to a Jewish service by a Jewish midshipman, give him an appreciation of the beliefs of Protestants and Catholics?
>
> "A. Well obviously, it is the understanding of the other religious beliefs of other Jewish members of the military academy that tends to be a greater understanding than that which he has, relative to Catholic and Protestant members, *but it is all part of the same spiritual ballgame,* and to the extent that attendance at one of these three is required, he develops understanding, which, otherwise, he would not have.[10] (emphasis added)" (Tr. 88-9, App. 94-5).

It is significant, we think, that even Admiral Calvert, Superintendent of the Naval Academy and a stalwart defender of its chapel policy, conceded the possibility that a course in comparative religion might be as effective or more effective than chapel to achieve the secular purpose of educating midshipmen about the religious beliefs of others. (Tr. 132, App. 75). We think it equally

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9 (continued) America, adopted by the 177th General Assembly in 1965. That report, based upon recommendations of the Special Committee on Relations between Church and State, provided, in part, as follows:

> "The 177th General Assembly . . .
>
> (7) Believes that formal instruction for future commanding officers concerning the ways in which they can fulfill their responsibility for the religious and moral welfare of those under their command will more effectively achieve the training objectives formerly assumed to be accomplished through required chapel attendance." (Pl. Ex. 38, p. 44, App. 153-A).

10 Plaintiffs are apparently not alone in finding Secretary Kelley's position less than convincing. The Secretary's piquant metaphor inspired at least one skeptical newspaper editorial. (cf. "The Spiritual Ballgame," *Annapolis Evening Capital,* Aug. 31, 1970, p. 4).

significant that the government has failed to furnish any testimony from any educator or clergyman that the classroom is not at least an equally effective means of achieving this objective. Instead, the government has offered the testimony of Assistant Secretary of Defense Roger Kelley, who, apparently in all seriousness, testified that "the substitution of a course in comparative religion [in lieu of mandatory chapel] . . . could have a very harmful effect on national security." (Tr. 87, April 27, 1970, App. 94).[11, 12]

The trial Court's finding that "lectures or courses in moral guidance, comparative religion, or ethics would not achieve the same effect as [chapel or church] attendance . . ." is grounded solely upon the conclusory opinion of Assistant Secretary Kelley (App. 51). We contend that this finding, unsupported by any empirical or expert testimony, is contrary to the weight of the evidence, and is clearly erroneous.

II. THE COMPULSORY CHAPEL REGULATIONS VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The trial Court dismissed plaintiffs' claimed violation of the Free Exercise Clause in a single paragraph, and concluded that:

> "These regulations in no way operate against a Cadet in practicing his own religion or in practicing none. The individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons, he can be excused from attendance." (App. 55).

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11 We have difficulty in reconciling this statement with Secretary Kelley's subsequent admission that, ". . . the greater exposure one has, the greater his understanding must be." (Tr. 90, April 27, 1970, App. 95).

12 We submit that such remarkable hyperbole is more in keeping with Mr. Kelley's prior employment as a public relations officer for Caterpillar Tractor Company, (Tr. 81), than with his present position as Assistant Secretary of Defense. In any event, Mr. Kelley's opinion, unsupported by any expert testimony, is surely less than self-evident, and cannot be said to constitute, "the clearest demonstration that nonreligious means will not suffice." *Schempp*, at 265.

We feel obliged to examine the evidence bearing upon these conclusions in some detail.

"These regulations in no way operate against a Cadet in practicing his own religion or in practicing none."

An examination of the compulsory chapel regulations of the Service Academies indicates several different ways in which these regulations interfere with a cadet's or midshipman's free expression of religion.

The first of these areas of interference arises from the basic concept of compelled attendance at a worship service. The fundamental constitutional flaw in this concept – as far as the Free Exercise Clause is concerned – was expressed by Justice Brennan in *Schempp*, as follows:

> "There are persons in every community – often deeply devout – to whom any version of the Judaeo-Christian Bible is offensive. There are others whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacrilegious, as one of the expert witnesses at the trial of the *Schempp* case explained. To such persons it is not the fact of using the Bible in the public schools, nor the content of any particular version, that is offensive, but only the *manner* in which it is used. For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience. One Protestant group recently commented, for example: 'When one thinks of prayer as sincere outreach of a human soul to the Creator, "required prayer" becomes an absurdity'." *Schempp*, 374 U.S. at 283-285.

Mandatory attendance at church or chapel simply cannot be reconciled with the Free Exercise Clause, since that Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion." *Schempp*, at 222-3. There can be no question about the coercive effect of the regulations, in view of the severe penalties for violation, and it is that very coerciveness which gives rise to the Free Exercise Clause violation. *Schempp*, at 223; *Board of Education v. Allen*, 392 U.S. 236, 248-9.

"The individual chooses which service to attend and he chooses whether to participate and worship or not."

The next area of interference arises from the transfer restrictions at all three Academies. As we have noted earlier (p. 6, 19, *supra*), cadets and midshipmen cannot transfer their attendance from one church or chapel service to another without first securing the approval of their parents and the chaplains involved. (Tr. 257, April 28, 1970, App. 109).[13] Even then, a midshipman at the Naval Academy must prove to the satisfaction of the Senior Chaplain that his religious beliefs have changed.

> "Requests for changes to a different denominational church based on the personal whims of the Midshipmen, rather than a sincere desire to affiliate with the stated denomination, will not be approved." Regulation 1502(1)(a).

The very considerable impediment which these regulations impose on religious experimentation of any kind were shown in the testimony of plaintiff Midshipman David Osborn (Tr. 254, Feb. 10, 1970, App. 87-8), but was probably best illustrated by the following testimony of Assistant Secretary of Defense Roger Kelley:

> "Q. What is the procedure for midshipmen or cadets who wish to attend religious services other than the one he has signed up for?
>
> A. Do you mean if he, for example, was attending the Protestant Worship Service and wished to transfer to the Catholic Worship Service?

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[13] The requirement of parental approval, together with frequent references by government witnesses to the immaturity of Academy students (Tr. A-7, Feb. 9, 1970; Tr. 257, April 28, 1970, App. 109) would seem to undercut the distinction drawn by the trial Court of the school prayer and bible reading cases as relating only to young, immature children. (App. 50n).

"Q. No. I mean that he is attending the Protestant Chapel service and he has never attended a Catholic service, and decides he wants to see it. He has not determined for himself that he wants to change his religion, but wants to merely attend a Catholic service. What procedure is there for him to do that, if any?

A. Well, he would request the opportunity to transfer from the requirement of attending the Protestant service to the requirement of attending the Catholic mass; and his request, if otherwise in order, would be referred to his parents if he was a minor, for their prior approval; and if he were not a minor, it would be referred to his parents for their understanding and information before the request was acted upon.

Q. Then, if it is acted upon, he is then required to go to that new Catholic mass from then on, is that correct?

A. Yes. . . . ." (Tr. 148-149, April 27, 1970, App. 98).

In discussing the Free Exercise Clause violation, we cannot omit the provision of the U.S. Air Force Academy Regulation 265-1, §3(d)(1), which, incredibly, limits attendance at off-base churches to those churches which are "established," and "cooperate" with the Academy, and are approved by the Senior Cadet Chaplain.

The totality of these several restrictions amounts to nothing short of a flagrant curtailment of the individual's religious liberty. In delivering the Opinion of the Court in *Schempp*, Mr. Justice Clark observed that: ". . . the Free Exercise Clause recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Schempp*, at 222. A cadet or midshipman at the Academies may also "freely choose his own course," with regard to worship attendance, but only as long as that course leads him to chapel, or to an "established and cooperating" church every Sunday morning.

In the most recent First Amendment case, Justice Harlan has summarized the general principle deducible from the Establishment and Free Exercise Clauses, and the cases construing them, as being:

> "That the government must neither legislate to accord benefits that favor religion over non-religion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion." *Walz v. Tax Commission, supra,* Concurring Opinion of Harlan, J., pp. 1-2.

In so stating, we think that Justice Harlan might well have had in mind the very regulations which are now before this Court, so accurately descriptive are his words. We think that the government cannot in good faith deny that compulsory chapel attendance is calculated to "favor religion over non-religion" and that the obvious purport of the regulations is to "encourage participation in . . . religion." Once it has been established that a governmental practice interferes with an individual's religious activities, the burden of persuasion shifts to the government. The two-fold burden which the government must sustain to validate the practice under attack derives from *Sherbert v. Verner,* 374 U.S. 398, and earlier cases, and was articulated by this Court as follows:

> "Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. The first is a clear showing that 'any incidental burden on the free exercise of appellant's religion [is] justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate****"' on this score, 'only the gravest abuses, endangering paramount interests' can engender permissible limitations on free exercise. The second is an equally convincing showing that 'no alternative forms of regulation would combat such abuses without infringing First Amendment rights.' For 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' However attractive the end to be achieved, the means employed must hoard First Amendment values." *Barnett v. Rodgers,* 410 F.2d 995, 1000 (U.S. App. D.C., 1969).

We submit that the government's evidence fails woefully to sustain either part of this dual test. What are the "gravest abuses, endangering paramount interests" which justify forcing atheists to sit through religious services, (Tr. 138, April 27, 1970, App. 96-7), or requiring parental permission to change from one service to another? We are not persuaded by Admiral Moorer's statement that if the requirement for parental approval were eliminated, ". . . we could very well have all kinds of objections, in terms of letters to Congressmen, direct visits by the parents, and so on." (Tr. 261, April 28, 1970, App. 110). While we sympathize with the desire of the military to stay within the good graces of Congress, especially in light of recent events, we cannot agree that the possibility of parental complaints to Congressmen is a sufficiently compelling state interest to justify the serious limitations on religious liberty here involved. [14]

Neither, plaintiffs submit, has the government satisfied the second requirement of proving that no other alternative method could achieve the same governmental purpose. This point has already been discussed at pp. 28-30, *supra*, in the context of the Establishment Clause, and we refer to that discussion, adding only the observation that, at least at the Naval Academy, it is clear that the alternative of a course in comparative religion has not only never been tried, but has never even received any serious consideration. (Testimony of Adm. Calvert, Tr. 136, Feb. 10, 1970, App. 76).

"And for sincerely held reasons he can be excused from attendance."

The government has sought to avert the legal consequences of compulsory chapel by noting that any cadet or midshipman who is able to prove to the authorities, "beyond a reasonable doubt." that chapel attendance would be

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[14] In this connection, we note Admiral Moorer's admission that the Department of Defense owes the same responsibility for the religious well-being of its personnel to the parents of *all* military personnel, and the Admiral's inability to give any reason for not requiring parental approval of chapel changes for non-Academy military personnel. (Tr. 262-3, April 28, 1970, App. 110-11.

"counter-productive" for him, may be excused. (Tr. 79, April 27, 1970, App. 93-4). At West Point, it does not appear that any cadet has ever been excused, (Tr. 196, 209, Feb. 10, 1970, App. 82; Tr. 363, 374-5, April 29, 1970, App. 124, 126-7), and four cadets who sought to be excused last year were labelled "troublemakers" and were invited to resign from the Academy. (Tr. 367, April 29, 1970, App. 125-6).

It is not surprising that so few Academy students have managed to get excused from chapel in view of what has been declared by the government witnesses *not* to constitute adequate grounds for excusal. Thus, it is no grounds whatever for a cadet or midshipman to claim that his constitutionally protected freedom of religion is being violated, (Tr. 79, April 27, 1970, App. 94). It is no grounds for excusal that a man states that his conscience requires that he, and not the Academy, decide whether and when he should attend worship service, (Tr. 119, April 27, 1970, App. 96); and it is not sufficient that the man is an atheist who does not believe in a supreme being (Tr. 138, App. 97). Neither is it sufficient grounds that compulsory chapel attendance is inhibiting a cadet's moral development, causing him to turn against religion because of the hypocrisy which he sees in the requirements. (Pl. Exs. 15 and 17, App. 136-7).

There is no need to extend this argument by reviewing the tortuous history of the unsuccessful attempts made by Cadets Vaught and Leslie over a three year period to get themselves excused. (Tr. 157-186, Feb. 10, 1970; Tr. 359-72, April 29, 1970, App. 77-81, 120-126). Suffice it to say that proving "beyond a reasonable doubt" that chapel attendance would be "counter-productive" has proved to be an almost impossible standard to meet.

For constitutional purposes, however, it makes no difference whether the excusal provision be genuine or illusory. The unconstitutionality of compulsory chapel under the Establishment and Free Exercise Clauses would not be altered if the regulations provided that anyone could be excused by request. The excusal defense was raised and flatly rejected in the *Schempp* case, as follows:

> ". . . [T]he laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for the fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel v. Vitale, supra*, at 430." *Schempp*, 374 U.S. at 225.

Under the Supreme Court's treatment of this issue, the excusal provision is equally ineffective as a defense to the Free Exercise Clause violation, since the cadet or midshipman is required to justify his request for excusal by explaining his innermost beliefs and convictions. *Schempp, supra*, at 287-9, 293.

It is fitting that this discussion of the Establishment and Free Exercise Clauses be concluded, as it began, by quotation from the landmark *Everson* case.

> "Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies." *Everson*, 330 U.S. 1 at 44 (dissenting Opinion of Rutledge, J.).

As the quotation suggests, the compulsory chapel regulations at the Academies are an outworn anachronism – a curious relic of a bygone era. Among theologians and writers in the field of church-state relations, the compulsory chapel policies at the Military Academies are so universally disapproved that nothing in defense of those policies is to be found in the literature. (Tr. 338, April 29, 1970, App. 119). Indeed, even among sectarian institutions of higher education, the universal trend has been from compulsory chapel attendance to voluntary. (Tr. 356, April 29, 1970, App. 120). Plaintiffs submit that much the same factors which make compulsory chapel undesirable from a religious standpoint render it unconstitutional from a legal standpoint, with respect to both the Establishment Clause and the Free Exercise Clause of the First Amendment.

III. THE COMPULSORY CHAPEL REGULATIONS CONSTITUTE A RELIGIOUS TEST UNDER ARTICLE VI

There is a long and unlovely history of man's efforts to keep his political community ideologically pure. Men's deepest loyalties have traditionally been deemed "religious," and in order to make certain that those loyalties were reliably anchored to the approved orthodoxies, governments have resorted to various types of "religious tests" for membership or leadership in the political community. These tests have sometimes taken the form of oaths, in which the aspirant swore that he did indeed believe the required doctrines (as the scholar and teachers at Oxford and Cambridge until the last century were required to sign the Thirty-Nine Articles of the Church of England in order to hold their positions). The oath did not so much guarantee that he believed what he swore as it provided a basis for prosecution if it later appeared that he didn't believe it.

Oaths alone, however, do not give as great a surety as acts, especially ritual acts related to religious loyalties. For this reason, religious tests have often taken the form of requiring the aspirant to perform certain ceremonies believed to be abhorrent to non-believers. The early Christians were compelled to offer a pinch of incense on the altar to the deified Roman emperor or otherwise to demonstrate by conforming religious acts their loyalty to the established order. (See, Pfeffer, Leo, *Church, State and Freedom*, pp. 12, 13). Failure to do so meant death, and many Christians died rather than go through the required gestures.

After Christianity was "established" by the Emperor Constantine, Christians in turn executed, imprisoned or exiled those who failed to meet the religious tests which *they* imposed. It was a sign of "progress" under Queen Elizabeth of England (in the Act of Supremacy of 1558) that non-juring citizens lost only their offices and other civic benefits rather than their heads.

But a sacramental test was still imposed upon the functionaries of the realm under Charles II, by the Test Act and the Corporations Act. All office-holders,

civil and military, were required to take the sacrament and to make a declaration against the Catholic doctrine of transubstantiation.

In later years, members of Parliament met the requirements imposed by the Act to Disable Papists from Sitting in Either House of Parliament (passed in 1677), by a practice known as "occasional conformity," in which they went to church and took communion in the Established Church once a year to demonstrate their fealty to the establishment, even though over the years there came to be less and less pretense that "occasional conformity" or behavior evidenced conformity of belief. Still this ritual requirement of members of Parliament endured until the latter part of the last century, defended by Blackstone in his *Commentaries* (Book IV, c. 4, p. 59).[15]

The founders of this nation were thoroughly familiar with such religious tests, and resolved that none should exist in the new nation, ending the last substantive Article of the Constitution with this sweeping prohibition:

> ". . . but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." (Article VI).

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15 "In order the better to secure the established church against periods (perils?) from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected; called the corporation and test acts: by the former of which no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelve-month before he has received the sacrament of the Lord's supper according to the rites of the Church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oaths of office; or, in default of either of these requisites, such election shall be void. The other, called the test act, directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the Lord's supper according to the usage of the Church of England, in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses, upon forfeiture of £500 and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I.c.2. which permits no person to be naturalized or restored in blood but such as undergo a like test: which test having been removed in 1973, in favor of the Jews, was the next session of parliament restored against with some precipitation." (*Commentaries*, Book IV, c. 4, p. 59).

Although many of the Colonies retained religious tests for a while after the ratification of the Constitution, most disappeared within a few decades. One of the last states to rid itself of religious tests was Maryland, where Jews were excluded from public trust or office until 1826, and non-theists until the historic decision of the U.S. Supreme Court in *Torcaso, supra,* (which was decided on the basis of the First Amendment rather than Article VI because the plaintiff, a notary public, held state office rather than federal).

Today, the only remaining formal religious test for public trust or office under the United States is the requirement that future officers of the armed forces taking their training at the Service Academies *must attend chapel* (or an approved alternative religious ceremony) *each Sunday morning* during three or more years of their academic careers.

The government has rather disingenuously contended that the requirement is only that the cadets or midshipmen *attend* the services and not that they *participate* in worship.[16] Yet, the United States Supreme Court has defined "establishment of religion" repeatedly to mean that "No person can be punished . . . for church *attendance* or *non-attendance*," (*Everson, McCollum, Torcaso, supra;* emphasis added), and religious bodies do not recognize any such distinction between *participation* and *attendance.* (Tr. 336, 346, April 29, 1970).

In addition, the government's witnesses have made no bones about the requirement, pointing out that no one is obliged to attend the Service Academies, that the mandatory chapel requirement is well known in advance to all applicants for appointment, and that if such a requirement is objectionable to them, they can refrain from applying or resign after appointment. What is this but a clearly-announced "Qualification for public trust or office under the United States?"

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[16] The Trial Court's opinion rests heavily upon its uncritical acceptance of this distinction, which it termed "crucial" to the case. (App. 54).

Whether the government requires "participation" in worship or adherence to religious doctrines is immaterial; the cadets or midshipmen are required to perform certain regular ritual acts which are indistinguishable from what they would perform willingly if they did participate and did believe. They march into church, they sit and stand when the worshippers sit and stand, they march out at the end of the service. (Tr. 385-6, April 29, 1970, App. 128-9). If they "sleep or appear to sleep," if they read or whisper or engage in other "disrespectful (non-worship-like) behavior," they are assessed various stipulated demerits or punishments. (App. 85). They are made to act as though they worshipped, as though they believed, as a requirement for becoming military commanders in the armed forces of the United States. How else can such a requirement be categorized but as a religious test for public trust or office under the United States?

And to confirm the efficaciousness of this religious test in excluding persons with certain unacceptable religious beliefs, the Chairman of the Joint Chiefs of Staff has observed from the witness stand that there are no atheists or agnostics in the upper levels of military command, (Tr. 208, April 28, 1970, App. 101), contrary to the stipulation in *Torcaso* that "neither a State nor the Federal Government . . . can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on belief in the existence of God as against those religions found on different beliefs." 376 U.S. 495.

Even if the Government's novel claims are accepted at face value, it cannot "impose requirements" which admit to "public trust or office" only those who will march to chapel every Sunday and conform to the religious rituals practiced there, while excluding those who refuse to do so. To prescribe religious acts in religious premises – or the *imitation* of them – is to impose a religious test as a qualification for public trust or office under the United States.

IV. THE TRIAL COURT ERRED IN EXCLUDING THE RESULTS OF THE OPINION POLL ON MANDATORY CHAPEL AT WEST POINT

In the spring of 1968, Lieutenant (then Cadet) Fred Van Atta ("Van Atta") a second-classman (*i.e.* a cadet in his third year) at West Point undertook to do a research study on the effects of mandatory chapel at West Point for a course in managerial psychology under the Department of Military Psychology and Leadership (Dep. 4, App. 159).[17]

The study took the form of a questionnaire (Pl. Ex. 40, App. 155), measuring attitudes toward religion and church attendance prior and subsequent to the cadet entering West Point. The sample consisted of the first platoons of the eleven companies of the Third Regiment, since cadets are assigned to each company on a random distribution basis as to background, religious faith, etc. (Dep. 6, App. 160-61). The same sampling technique is employed by the Academy itself in surveys which it performs (Dep. 6, App. 161).

Approximately 230 out of 350 of the anonymous questionnaires were returned. Some incomplete or improperly filled out questionnaires were removed,

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[17] Plaintiffs' Exhibit 4, containing the results of the Van Atta Survey, were first offered by plaintiffs through Lieutenant Robert L. Leslie, a friend and classmate of Van Atta, at trial on April 29th. (Tr. 383, App. 127), but the Court reserved ruling on its admissibility to permit the taking of the deposition of Lieutenant Van Atta himself. On May 20, 1970, the deposition of Lieutenant Van Atta was taken in Denver, Colorado and was subsequently filed with the Court. On June 25th the Court heard oral argument on the admissibility of Exhibit 41, and ruled that it was inadmissible ("The basis of my ruling is that I am not happy that the manner in which this deposition was taken meets the standards of reliability") (Tr. 450, App. 132). Plaintiff offered the deposition of Lieutenant Van Atta (Plaintiffs' Exhibit 42) into evidence, but it was excluded in its entirety, and the Court also refused to permit plaintiff to introduce individual questions and answers (Tr. 431-451, App. 129-32). Nevertheless, the government referred extensively to the deposition in arguing that Exhibit 41 should be excluded, and the Court several times made clear that its exclusion of Exhibit 41 was based upon the testimony contained in the deposition (Tr. 440, 441, 451, App. 130-32). References to the deposition will be designated as "Dep. 7, 8, . . . etc."

and the data on the remaining 205 completed questionnaires was transferred to IBM cards and fed into a computer (Dep. 10, App. 163). A several page computer print-out was obtained, containing a breakdown of the respondents' answers in terms of religion and class at the Academy. The accuracy of the computer print-out was confirmed by Lieutenant Van Atta by performing some pencil and paper calculations. (App. 169). The computer print-out was shown to Lieutenant Leslie, who prepared a tabular summary of the results (Pl. Ex. 41) (Dep. 18, App. 168) (Tr. 383-4, App. 127).

Prior to conducting the survey, Van Atta had taken several courses in statistics and computer programming and was president of the Computer Forum at West Point (Dep. 20, App. 168-9). The original of the computer print-out and report was last seen when it was submitted to the Department of Military Psychology and Leadership at West Point (Dep. 18, 49, App. 168). Prior to taking the poll, Van Atta had no preconceived ideas about the desirability of mandatory chapel attendance (Dep. 21, App. ____).

The use of opinion polls as evidence has been the subject of extensive commentary in recent years. (See case and treatise authorities collected in annotation "Admissibility and Weight of Surveys and Polls or Consumers' Opinion, etc." 76 A.L.R. 2d 619). Nearly a decade ago, opinion surveys had reached a sufficient degree of acceptance that the Court in the frequently cited "Zippo Lighter" case was able to conclude that "The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted surveys. Although courts were at first reluctant to accept survey evidence or to give it weight, the more recent trend is clearly contrary." *Zippo Manufacturing Co. v. Rogers Import, Inc.*, 216 F. Supp. 670 D.C.S.D.N.Y. (1963). The propriety of receiving such evidence has been tacitly approved by the Supreme Court in a case arising from this circuit. *Pollak v. Public Utilities Comm.*, 89 App. D.C. 94, 191 F.2d 450, 343 U.S. 451 (1951).

As the very comprehensive annotation at 76 A.L.R. 2d 619-670 indicates, different courts have discussed in great detail the implications for admissibility of such factors as methodology, sample selection, determination of "universe," construction of questionnaires, etc. The overriding principle which emerges from a review of the cases is that if the poll was unbiased, the sampling and drafting of the questionnaires done in a reasonable manner, and the results relevant to an issue in the case, the evidence will be admitted.

In the present case, these criteria, we submit, have all been satisfied. The uncontradicted evidence is that Van Atta, the author of the study, was unbiased, and the sampling technique was the same as the technique used by the Academy for its own surveys. The results, showing as they do the very strong negative impact of mandatory chapel upon religious attitudes, is clearly relevant to a principle issue in this case – *i.e.*, whether mandatory chapel has a primary effect which aids or inhibits religion. Accordingly, the evidence of the survey results (Pl. Ex. 41, App. 156) was improperly excluded.

CONCLUSION

For the reasons stated, plaintiffs pray that paragraphs (1) and (2) of the Order of the District Court be set aside, and judgment entered declaring the mandatory chapel regulations of the United States Military Academy, United States Naval Academy, and United States Air Force Academy to be in violation of Article VI and the First Amendment to the Constitution, and enjoining the defendants from continuing to enforce the said regulations.

Respectfully submitted,

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BRIEF AND APPENDIX FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,617

MICHAEL B. ANDERSON, *et al.*, APPELLANTS

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

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C.A. No. 169-70

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellees, the following issue is presented:

Do the regulations which require cadets and midshipmen at the United States Service Academies to attend a religious service each Sunday offend either the First Amendment or Article VI of the Constitution?

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* This case has been before this Court in other connections on three prior occasions as *Anderson* v. *Laird*, No. 23,906.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,617

MICHAEL B. ANDERSON, *et al.*, APPELLANTS

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

In a complaint filed in the District Court on January 20, 1970, appellants,[1] in a class action [2] on behalf of themselves and all other midshipmen and cadets at the three

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[1] The suit was originally brought by one cadet at the United States Military Academy and five midshipmen at the United States Naval Academy. The midshipmen, all minors, appeared by their next friend, Robert J. Drinan, S.J. On April 29, 1970, without objection by the defendants, the trial judge allowed an additional cadet and three midshipmen to intervene as parties plaintiff pursuant to Rule 20 (a), F.R. CIV. P. Since the filing of this appeal two midshipmen have moved to withdraw from the case. Their motions were granted by orders of this court dated November 24 and December 1, 1970.

[2] On April 29, 1970, the District Judge ordered that this suit be permitted to proceed as a class action pursuant to Rule 23 (b), F.R. CIV. P.

United States service academies,[3] brought suit against the Secretary of Defense and the Secretaries of the Army, Navy and Air Force seeking declaratory and injunctive relief to compel the defendants to abolish the requirement of mandatory Sunday church or chapel attendance at the service academies.[4] Trial was held in the United States District Court on February 9, 10, 11 and 12 and on April 27, 28 and 29, 1970. On July 3, 1970, the trial judge filed an "Opinion and Order"[5] in which he denied the relief requested by appellants. This appeal followed.[6]

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[3] The United States Military Academy at West Point, New York; the United States Naval Academy at Annapolis, Maryland; and the United States Air Force Academy at Colorado Springs, Colorado. None of the plaintiffs, however, has ever been a cadet at the United States Air Force Academy.

[4] Appellants complaint also requested relief in the nature of mandamus concerning the record of one Nicholas Enna, then a midshipmen at the United States Naval Academy. Midshipman Enna was discharged from the Academy on February 27, 1970, because of academic deficiency. See affidavit of Rear Admiral James Calvert attached to "Appellee's Opposition to Appellant's Motion for Summary Reversal," filed in this court on January 30, 1970, in No. 23,906.

[5] The trial court's opinion is published. *Anderson* v. *Laird*, 316 F. Supp. 1081 (D.D.C. 1970). For the convenience of the court, however, the opinion is reproduced as an appendix to our brief. References to the opinion are keyed to the appropriate page in the appendix. The trial transcript is in ten volumes numbered "A", then one through eight, including volumes 6 and 6(a). Transcript citations begin with a reference to the volume number and then to the appropriate page. Thus page 10 in volume 5 is designated as 5 Tr. 10.

[6] This case has been before this Court on three prior occasions. The first was an appeal from the District Court's denial on January 29, 1970, of appellants' January 23 motion for a temporary restraining order. By order of February 4 this Court denied appellants' motion for summary reversal of that order. It also ordered that during the pendency of this suit no action might be taken against any of the named plaintiffs for violation of Sec. 1501(1)(a) of the regulations of the United States Naval Academy or Para. 819 of the regulations of the United States Corps of Cadets at West Point (These regulations are quoted in footnote 9, *infra*). Both in February and in March appellants moved that appellees be ordered to show cause why they should not be held in contempt for

The testimony in the District Court established the following: [7]

The operation of the United States service academies constitutes a military activity of the Federal Government. The academies are administered by the respective military services and secretaries under the overall direction of the Secretary of Defense. The purpose of the academies is to train leaders who will form the backbone of the future officer corps of the nation. The methods by which the academies mold responsible and effective officers are not comparable to those employed at other institutions of higher education. In addition to an extensive academic schedule, these techniques include the cadet [8] code of honor, mandatory athletic training, compulsory military drills and pervasive military discipline. A cadet's life is almost completely programmed for four years.

As part of that program cadets are required to attend a religious service each Sunday.[9] Each cadet is allowed to

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violating that section of this Court's February 4 order. Both those motions were ultimately denied by this Court. On all three occasions here described the case was before this Court as No. 23,906.

[7] During the trial the Government relied primarily on the testimony of Admiral Thomas H. Moorer, then Chief of Naval Operations and now the Chairman of the Joint Chiefs of Staff, and Mr. Roger T. Kelley, Assistant Secretary of Defense in charge of manpower and reserve affairs. These witnesses expressed not only their personal opinions but the institutional judgment of the Department of Defense (5 Tr. 19, 25, 134-136, 146-147; 6 Tr. 170, 182-183). Admiral James Calvert, the Superintendent of the Naval Academy, was called as a witness by appellants, but, where supportive of positions taken by Government witnesses, his testimony is cited in our counterstatement.

[8] Unless otherwise specified, the word "cadet" as used herein includes students at all three academies.

[9] Part II, ch. 15, § 1501(a) of the United States Naval Academy Regulations, provides in pertinent part:

> 1. The basic requirements concerning religious matters at the Naval Academy are:

[Footnote continued on page 4]

attend the service of his choice.[10] Nothing more than *attendance* is mandated by the regulations. What an individual believes and whether he chooses to worship are entirely personal matters with which the academies have no concern. The distinction between the absolute right to worship and believe as one chooses and the responsibilities of one who voluntarily assumes a command position was stressed by the military leaders who testified. Admiral Calvert said:

> It is not the business of the Academies to be involved in the personal religious beliefs of [their men]. . . . If a man in his own intellectual situation really does not believe, that is his privilege; but it is not his privilege as an officer who is doing his job satisfactorily to ignore the religious feelings of his men.[11] (2 Tr. 121, 1a Tr. 12; *cf.* 1a Tr. 9.)

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[9] [Continued]

> (a) All midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times.

Regulations for the United States Cadet Corps of the United States Military Academy, ch. 8, § IV, ¶ 819, provides:

> Attendance at Chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel service on each Sunday, according to announced schedules.

Air Force Regulations No. 265-1 provides in pertinent part:

> Attendance at an established church service is mandatory for those Second, Third and Fourth Classmen present for duty in the Cadet area.

[10] At the Naval and Air Force Academies midshipmen and cadets may attend services held on the academy grounds or in churches located in Annapolis or Colorado Springs. Admiral Calvert testified that at Annapolis "there are twenty-one different church parties of eighteen different denominations" which go into the city each Sunday. One of them "involves two midshipmen who simply go to a man's house for meditation . . . and it is not a regular church service" (2 Tr. 108). West Point, however, is not located in any town, and thus cadets must choose to attend either the Catholic, Protestant or Jewish services which are made available at the academy.

[11] Secretary Kelley and Admiral Moorer emphatically agreed (5 Tr. 38; 6 Tr. 193, 201, 244).

Despite this absolute non-interference with religious beliefs, it has long been recognized that even mere attendance at religious services could be so disturbing to the conscience of a cadet that his presence would be counterproductive to the military goal of equipping him to respond to the religious needs of his men.[12] In such cases cadets are excused and, as a matter of practice, have been required to substitute a study of religion in a classroom atmosphere (2 Tr. 114, 129). If, however, a cadet absents himself from chapel attendance or the substitute study without permission, he is subject to the same penalties which would be imposed for missing any other scheduled exercise (2 Tr. 148-149).

The all-encompassing character of academy programs is made necessary by what Secretary Kelley characterized as the "unlimited" responsibilities of a commander (5 Tr. 43). In Admiral Moorer's judgment:

> The responsibility and indeed accountability of every commander is to insure that he puts forth every effort to protect and enhance the welfare of the personnel under his command . . . . He must look on each man as an individual and make certain that the needs, the welfare and the desires of each individual are taken into account when he issues orders, establishes routines or takes any action which would [have] impact on the day-to-day life of the individual concerned . . . . [Ultimately] leadership is the art or technique of influencing an individual or a group of individuals to work together toward the achievement of a common goal; and you will not get

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[12] A cadet has always had the right, explained to him on entering an academy, to request relief from any regulation of the academy (2 Tr. 129; 3 Tr. 319-320, 343). That policy was specifically reaffirmed with respect to chapel attendance during a conference of the superindentends of the three academies in April 1969 at which the superintendents concluded that:

> It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen (3 Tr. 305).

> this kind of effort and this working together unless the individuals in the command have the utmost confidence that the commander recognizes them as individuals and will take every action in his power to see to it that their welfare, . . . their desires and their needs are always considered when he gives an order. (6 Tr. 187-189.)

Since the vast majority of the men whom the cadets will eventually lead subscribe to the principles of the Judaeo-Christian heritage (5 Tr. 40), it was the opinion of Admiral Moorer, Secretary Kelley and Admiral Calvert, as well as the combined opinion of the superintendents of the service academies and the institutional judgment of the Department of Defense,[13] that it is necessary to develop in the cadets a respect for, understanding of, and sensitivity to the religious feelings of others (A Tr. 5, 11, 13; 2Tr. 106-107, 120, 126-130, 138; 5 Tr. 27-29, 41-43, 71, 111-112, 122-123, 140; 6 Tr. 191, 211, 229). This is particularly true in combat situations. Said Admiral Moorer:

> [In] a crisis situation, different men react in different ways, and it is very important that the commander . . . understands why the various men in his command will react in a different way and why some of them find a need to resort to religion to support them in this time of extreme danger and extreme trial. And unless he understands that many people have this feeling and have this need to resort to religious beliefs to provide strength to them in time of crisis, he cannot properly . . . handle this crisis situation (6 Tr. 205).[14]

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[13] See note 7, *supra*.

[14] In this connection Admiral Calvert drew a sharp distinction between the religious feelings of civilians "in a comfortable courtroom in 1970 [who] are never worried or concerned about their welfare" and the plight of men in a "submarine off the coast of Japan in 1943" (1a Tr. 7-8). Said Secretary Kelley: "The combat environment exposes people to death. There is more conscious attention to death and, therefore, to the meaning of life. My own

Admiral Moorer concluded that if the line officer cannot cope with these problems there is no one who can, for it is "only on a rare occasion" that a chaplain is present in a crisis situation (6 Tr. 206).[15] Thus Admiral Calvert concluded that understanding and respect for the religious feelings of others is "simply one of the responsibilities of command" (1a Tr. 11). Moreover, the military leaders strongly stated that a failure to respond to such religious needs has important military implications since, by destroying morale, it can seriously reduce combat effectiveness (1a Tr. 5-8, 11; 5 Tr. 41-43, 71; 6 Tr. 205). That position was perhaps most succinctly set forth by Secretary Kelley:

> Morale is the difference between a combat unit performing beyond the normal levels of expectation and a combat unit falling apart because its individual members lack the spiritual fibre and the group morale to make that unit perform. This is the intangible factor that separates the men from the boys. (5 Tr. 43.)

The unanimous opinion of appellees' witnesses, as well as the institutional judgment of the Defense Department,[16] was that the purpose of the chapel requirement is secular. Admiral Moorer testified that its "sole" purpose is:

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personal expeirence . . . is that in a combat environment people . . . draw upon . . . their own beliefs relative to spirituality, relative to their dependence upon God or a supernatural being, and . . . the need for this understanding becomes greatest under those conditions". (5 Tr. 41-42.)

[15] Secretary Kelley put it this way:

> Most of the situations where the individuals must draw upon this spiritual reserve occur without a chaplain in sight and, therefore, it falls upon the officer leaders of these men to provide effective leadership and to provide some counseling to the individual . . . . [I]t is in this area that the line officer becomes the spiritual counselor of his men (5 Tr. 42).

Admiral Moorer noted that, in addition to their absence from combat zones, there are no chaplains in the smaller units, on smaller ships, or on isolated bases and areas (6 Tr. 206).

[16] See note 7, *supra*.

> To enhance [a cadet's] leadership . . . by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently as he acts as a leader in later years, he will appreciate this impact that religion has on so many people (6 Tr. 191).

Secretary Kelley's judgment was the same. He said the "sole" reason for the regulation is:

> To help midshipmen and cadets understand the basis of religious belief and practice on the part of other midshipmen and cadets and thus equip [them] for positions of leadership (5 Tr. 26-27, 111, 123).

Not only did the testimony establish that the purpose of the chapel requirement was secular, but there was equal unanimity of opinion that its primary effect has been to produce officers who are sensitive to the religious needs of their men and therefore much more effective military leaders than they would otherwise have been (1a Tr. 6-8; 5 Tr. 40, 77, 130; 6 Tr. 204-206, 216, 220). This result has repeatedly been manifested under the stress of combat and in other situations where chaplains were not available. Both academy graduates who testified related how chapel attendance had enhanced their personal leadership capability during time of war. Admiral Calvert's experience is particularly illustrative:

> It has always fallen to the commanding officer to have some sort of religious service for men who, in time of war, were frightened, worried and concerned . . . . I was called on to do it as a young officer in the submarines and I had *nothing* to fall back on except my memory of the chapel services at the Naval Academy. I used them as a model because *I knew nothing better. I am not a person of deep religious conviction* or great religious background (1a Tr. 7-8) (emphasis added).

Admiral Moorer's experience was similar:

> I recall during the time that I was aboard the ship that was sunk[17] and managed to get this surviving

[17] The details of this episode are related at 6 Tr. 172-173.

> part of the crew ashore . . . that the reaction under this very severe situation, the reaction of the individuals differed. Some of them wanted to spend most of their time in prayer . . . and some of them were very much concerned in this regard; and I think I was able to take better care of them and to make their situation easier simply because I understood what their problem was.
>
> Some of the men were not interested, and that was perfectly all right with me too, but I think it is *absolutely mandatory* for one who is going to find himself in command of very serious crises to understand . . . that different people react in different ways, and many people immediately turn to religion in the case of an emergency (6 Tr. 210-211) (emphasis added).[18]

Based on his personal knowledge of some 25,000 academy graduates (6 Tr. 204) Admiral Moorer concluded:

> My experience has been that they all feel that attendance [at] the chapel and . . . the various churches enhanced their capability as leader[s] and added to their capacit[ies] as Naval Officer[s] (6 Tr. 216).

He "strongly" disagreed with any suggestion that the chapel requirement had resulted in creating any hostility toward religion among the thousands of academy men with whom he was familiar (6 Tr. 216, 219-220, 229).

Government witnesses testified that more than a century of training military leaders has established that the best way of inculcating in future officers the necessary awareness of the impact religion may have on the lives of men is to require weekly chapel attendance. Their testimony was unanimous that no classroom study of religion could produce the "absolutely mandatory" (6 Tr. 210-211) respect, understanding and sympathy for religion which has historically been bred by chapel attendance. Admiral Moorer opposed any such substitution:

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[18] Secretary Kelley, while serving as a commanding officer of a Navy ship, had likewise assumed this responsibility during the war (5 Tr. 126-131).

> [It] would be artificial because that is not the way that people live and that people feel and so on with respect to religion. So, I think it is better, by far, to . . . require the midshipmen to observe this in a real world. (6 Tr. 192.)

Secretary Kelley's repeated indictments of substituting a religion class were similar. Expressing his own opinion as well as the institutional judgment of the Department of Defense, he said that such a class

> simply provides the intellectual pieces of the religions of the world. It fails to provide the individual students with any particular insight or understanding of the convictions held by other individuals (5 Tr. 87).[19]

The emphasis of the current regulation is not doctrinal but emotional. It is intended to facilitate empathy with religious feeling, not an intellectual grasp of specific religious tenets.[20]

Military leaders uniformly emphasized that the performance of academy graduates is the benchmark against which the performance of other commissioned officers of the United States Armed Forces is measured (1a Tr. 5;

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[19] Secretary Kelley's testimony also covers this point at 5 Tr. 28, 88-91, 147-148. Admiral Calvert's testimony was in agreement. See 1a Tr. 6, 9; 1 Tr. 134, 136; compare 1 Tr. 132.

[20] Regular attendance at any religious service was deemed sufficient to produce the effect desired by the military. According to Secretary Kelley:

> One of the lessons learned by attendance of any one of these three, I'm referring to Jewish, Protestant and Catholic services, is an appreciation for, and a tolerance of the beliefs and strongly held convictions of the people in the spiritual realm. While the young man who attends Catholic Mass on Sunday may not learn Protestant dogma as such, or Jewish dogma, as such, he nevertheless develops to a greater degree than he otherwise possibly could, an appreciation for the spiritual fibre [of] other members of the Armed Forces, whether they happen to profess Jewish, Protestant or Catholic faith[s] . . . . [Thus] attendance at *one* of these . . . is sufficient to produce the effect of understanding of religious beliefs. (5 Tr. 89-90.)

5 Tr. 75-76, 84-86; 6 Tr. 185-186, 191). Additionally they noted that, in the final analysis, the performance of our military is no more and no less effective than the leadership provided by its officers (5 Tr. 23). Since the academies provide our "key reservoir of officer talent," their operation is vital to our national security (5 Tr. 23). In short, the academies are the "key" to our "whole national security system" (*Id.;* 6 Tr. 182-184). Against this background Secretary Kelley concluded that the elimination of chapel attendance would

> remove one of the very essential components of officer development, and thus weaken the fibre of officership in the services, [and] to the extent that it weakens our officer growth or our officer performance . . . it could have *a very harmful effect on national security* (5 Tr. 87) (emphasis added).

Two graduates of West Point, one West Point cadet and two Annapolis midshipmen testified for appellants.[21] All five said that they found the chapel requirement offensive (2 Tr. 159, 205-207, 253-254, 403-404; 7 Tr. 360). Lieutenant David Vaught, a 1969 graduate of West Point and a Baptist, testified that he requested that he be allowed to attend Baptist services at churches within a twenty-mile radius of West Point in lieu of fulfilling the chapel regulaton. Later he asked that he be permitted to attend such services in addition to chapel.[22] He did not receive a favorable response on either request (2 Tr. 176).[23] West Point Cadet Michael Anderson testified that he had never requested that he personally be excused from

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[21] A large part of their testimony concerned the question of whether administrative remedies existed and had been properly pursued. Since that question is not germane to this appeal, that aspect of their testimony will not be discussed here.

[22] Lieutenant Vaught had also submitted a general request that the chapel obligation be abolished (2 Tr. 167).

[23] Lieutenant Vaught had also objected to a requirement that each cadet contribute 25 cents per month to support the three West Point chapels. Following that objection, West Point made all such contributions voluntary (2 Tr. 158-159, 162, 171).

chapel, but he had, without success, generally attacked the requirement as unconstitutional (2 Tr. 231-232). Midshipman David L. Osborne, who attended Methodist services in the town of Annapolis, said he had found the conduct of many cadets at the Annapolis chapel to be disrespectful. He stated that he wished to attend a variety of churches to learn more about religion, but, feeling that this would not be permitted, he submitted no such request (2 Tr. 253-256). Lt. Robert Leslie said he found the services "somewhat offensive" and "somewhat disgusting" (7 Tr. 360, 395). On those grounds he attempted to be excused from the requirement, but his request was denied. Midshipman Thomas L. Travis filed a specific request that he personally be exempted from the chapel requirement. That request was granted (2 Tr. 414).

Appellants called four religious leaders to testify in their behalf. All four were opposed to the chapel regulation (1 Tr. 23-24, 63-64, 84-86, 95). Reverend Glenn Jones contended that the requirement was inconsistent with the chief tenet of the Baptist faith, which is that all men should be "*at liberty to profess their faith*" (1 Tr. 25) (emphasis added). Reverend Robert F. Drinan, S.J., stated that the requirement was repugnant to the conclusion of Vatican II that "in matters of religion no one is to be forced to act in a manner contrary to his own *beliefs*" (1 Tr. 62) (emphasis added). Reverend Earl H. Brill and Rabbi Eugene J. Lipman both stated that compulsion was inherently inconsistent with *worship* (1 Tr. 81, 94-95) (emphasis added). Reverend A. Ray Applequist [24] stated that compulsory chapel at the service academies had an "adverse effect" on the general recruitment of chaplains for the military (6a Tr. 282). On cross-examination, however, Reverend Applequist conceded that he knew of no individual who refused to become a service chaplain for this reason alone (6a Tr. 288-289). He further admitted that there is now no shortage of military chaplains (6a Tr. 285-286). Reverend Applequist, like

[24] The transcript erroneously spells his name "Applecrist."

the Reverends Brill and Jones, believed that the compulsory chapel requirement sometimes inhibited the growth of religion (6a Tr. 284-285, 293-294; 1 Tr. 23-24, 84-86).[25] Brill and Jones further stated that religion was sometimes aided by this requirement (1 Tr. 23-24, 84-86). Both they and Father Drinan believed that moral values and ethics should be taught at the academies, but they emphasized that such teaching should take place in the classroom (1 Tr. 36-37, 74-75, 88-91). Finally, Reverend Dean M. Kelley testified that no distinction between attendance and worship is drawn "in the instruction of clergymen and other churchmen in liturgical practice" (7 Tr. 336). Reverend Kelley's opinion was that permitting observers to attend worship would have a "chilling effect . . . upon the effort of worship of the worshipping congregation" (7 Tr. 337).[26]

None of appellants' witnesses professed familiarity with the service academies or the goals of the military in requiring church attendance. Moreover, only Reverend Jones indicated that he had known many academy graduates.[27] Reverend Jones said that it was his observation that compulsory chapel had been appreciated by some academy graduates but created hostility toward religion

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[25] On cross-examination, Reverend Applequist stated that the basis for his conclusion was a 1953 conversation with one West Point graduate in the hills of Korea and a general recollection of similar remarks made by about six other graduates of West Point (6a Tr. 284-285, 290, 293-294).

[26] On cross-examination, however, Reverend Kelley, a Methodist, admitted that he approved of members of his congregation bringing non-believers to worship services, and he further conceded that many Methodist ministers and schools disagreed with his conclusion that there was no valid distinction between attendance and worship (7 Tr. 341-343, 345-353).

[27] Reverend Jones had been a Navy chaplain for twenty-three years before he retired in 1965 and had known "hundreds of academy graduates" (1 Tr. 22, 31). Compare Reverend Applequist's testimony, *supra* note 25. In addition to these men, only Rabbi Lippman had been in the military. He saw three years of active service, 1944-1946 and 1951 (1 Tr. 93-94).

in others (1 Tr. 22-24, 31-32). He also testified, however, that he believed "from the depth of [his] heart" that the greatness of our officer corps is "fundamentally founded upon the moral character of these men" (1 Tr. 30). Moreover, when asked whether he believed that an understanding of the principles of the Judaeo-Christian tradition were "indispensible to great military leadership insofar as handling subordinates is involved," he could only reply that "that is a very hard question" (1 Tr. 34). Reverend Applequist, on the other hand, testified that an ability of a commander to render spiritual guidance if needed was "certainly a characteristic of great leadership" (6a Tr. 293). Only Rabbi Lipman contended that the chapel attendance requirement would not effectively achieve the secular purpose for which it was initiated. In this connection Rabbi Lipman maintained that such a requirement would not build character; even he, however, never claimed either that it would not develop in military leaders an understanding of and respect for the religious feelings of *others* or that such an understanding was not prerequisite to good military leadership (1 Tr. 97-98).

Reverend Angelo D'Agostino, S.J., testified as a psychiatric expert. Although he professed no knowledge of the structure or workings of the service academies, Father D'Agostino stated that every large group contains a certain number of obsessive personalities and that "this is a normal kind of personality pattern that enables people to get through medical school, military academies and so on" (3 Tr. 376). For these individuals "any sort of compulsion" will prevent proper maturation (3 Tr. 377). Thus, Father D'Agostino concluded, compulsory chapel would harm these individuals (3 Tr. 377, 391). He admitted, however, that, given his theory, "the compulsion to . . . salute . . . to take athletics . . . [and] to live the military code" would all produce the same deleterious psychological effect (3 Tr. 391).

ARGUMENT

The ruling of the District Court was specifically limited to the unique facts of this case and, on those facts, was correct.

I. *The Background of This Case*

Issues raised by the religion clauses of the First Amendment[28] have received a great deal of attention from the Supreme Court. The issues are complex, and the guide to decision-making furnished by precedents in this area is often less than lucid. No prior decisions of which we are aware consider First Amendment religion issues raised by a military regulation of long standing. This absence of decisional authority compels us to focus on the precise limitations of the trial court's ruling before we proceed to discuss cases dealing with the religion clauses in other contexts. The District Court's ruling is restricted in a variety of ways by the unique facts of this case. All such limitations will ultimately be discussed,[29] but two are immediately apparent.

A. *The History of the Regulations*[30]

There has been "an unbroken pattern of 150 years of mandatory chapel under the eyes of the President and the Congress, the military authorities and the public in

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[28] The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

[29] See pp. 24-26, 28, 33, 40, *infra*.

[30] In addition to appellants' brief, three groups of amici curiae have filed briefs in this case. The lengthiest of these, filed on November 24, 1970, by Messrs. Pfeffer, Levy, *et al.*, will be referred to as amicus I. Amicus briefs of the Baptist Joint Committee on Public Affairs, with Mr. Friedman on the brief, filed November 24, 1970, and the General Commission on Chaplains and Armed Forces Personnel, with Mr. Adams on the brief, filed November 24, 1970, will not be specifically mentioned herein.

general."[31] As a matter of constitutional construction the lengthy existence of this practice is necessarily "a fact of considerable import in the interpretation of abstract constitutional language."[32] The genesis of this rule is not to be found in an exaggerated regard for tradition as such but rather in a healthy respect for the illumination which history can shed on the realities of the present and the probable events of the future. Such lessons are particularly valuable in defining the often elusive meaning of the religion clauses of the First Amendment, for

> The First Amendment does not prohibit practices which by any *realistic* measure create none of the dangers it was designed to prevent . . . . It is of course true that great consequences can grow from small beginnings but the measure of constitutional adjudication is the ability and willingness to distinguish between *real threat and mere shadow.*[33]

At a minimum, the longevity of this tradition places a heavy burden on appellants to demonstrate that the evils

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[31] Opinion of the District Court, appendix, *infra*, p. 56. As the trial judge noted, such observance is not passive but, by law, is compelled to be active. Title 10, U.S. Code §§ 4355, 6968 and 9355, requires that each year a Board of Visitors shall be constituted for each of the service academies. It is made up of the Chairman of the Committee on Armed Services of the Senate (or his designee); three other members of the Senate (two of whom are members of the Committee on Appropriations); the Chairman of the Committee on Armed Services of the House of Representatives (or his designee); four other members of the House of Representatives (two of whom are members of the Committee on Appropriations); and six persons designated by the President. Among their duties are to *visit* the academies at least once a year and *inquire* into the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods and other matters relating to the academies. The Board is required to *report* to the President within sixty days after its annual visit to each academy.

[32] *Walz* v. *Tax Commissioner*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring); see *id.* at 678-679 (majority opinion).

[33] *Abington School District* v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) (emphasis added).

to which they point are substantial and widespread. It clearly cannot be persuasive to argue that chapel attendance is only a first step toward the establishment of religion, for if it is, "the second step has been long in coming." [34]

B. *The Military Context of the Regulation*

The chapel attendance requirement is an integral part of our most advanced and productive military training programs. The District Judge's opinion carefully outlined and exhaustively documented the importance of the military training context to the result of this case,[35] yet this entire segment of the court's opinion is totally ignored by appellants.[36] We emphasize, and appellants cannot deny, that "the courts have always been reluctant to interfere in the management of the military serv-

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[34] *Walz, supra note* 32, 397 U.S. at 678; *cf. Levy* v. *Corcoran,* 128 U.S. App. 388, 390, 389 F.2d 929, 931 (Leventhal, J., concurring), *cert. denied,* 389 U.S. 960 (1967). Amicus I attacks the value of "tradition as evidence of constitutionality" (brief, pp. 12-16). The thrust of this argument, however, is that tradition is not dispositive of the question. That was explicitly recognized by the District Judge (appendix, *infra,* p. 57) and is not here in dispute despite amicus' suggestion to the contrary. Additionally, amicus I attempts to avoid the force of the *Walz* constructional rules by arguing that tax exemptions were widespread but that chapel attendance is "limited to a few military academies" (brief, p .15). That argument is at best a two-edged sword, since the more limited the program, the less compelling any establishment argument. *McCollum* v. *Board of Education,* 333 U.S. 203, 225 (1948) (Frankfurter, J., writing for himself and Justices Jackson, Rutledge and Burton, concurring). More significantly, amicus I ignores the fact that the chapel regulation exists at *all* service academies and therefore satisfies any "universality" requirement of *Walz,* particularly where annual review of these academies is required by statute. See note 31, *supra.* In appellants' brief, the historical context of the regulation is ignored, and in our view it cannot be.

[35] Appendix, *infra,* pp. 52-55.

[36] Amicus I does treat this question. Amicus' primary contention, however, is that military actions are not immune from judicial scrutiny (brief, pp. 7-10). Since this proposition was explicitly recognized by the District Judge (appendix, *infra,* p. 54), we do not further discuss it here.

ices"[37] and that military training is a matter of "substantial national importance scarcely within the competence of the judiciary."[38] First Amendment rights are not absolute and have often been severely limited with respect to members of the military[39] and other special groups[40] where necessary to protect or promote valid and substantial state interests. The Second Circuit graphically portrayed the situation of the soldier as follows:

> Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice will cease to exist. He acts at the command of some person—not a representative of his own choice—who gives commands which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his own choosing and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed forces,

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[37] Appendix, *infra*, p. 52. *See Noyd* v. *Bond*, 395 U.S. 683, 694 (1969); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953); *Goldwasser* v. *Brown*, 135 U.S. App. D.C. 222, 417 F.2d 1169 (1969), *cert. denied*, 397 U.S. 922 (1970); *Luftig* v. *McNamara*, 126 U.S. App. D.C. 4, 373 F.2d 664, *cert. denied*, 387 U.S. 945 (1967); *Nixon* v. *Secretary of the Navy*, 422 F.2d 934 (2d Cir. 1970); *Byrne* v. *Resor*, 412 F.2d 774 (3d Cir. 1969); *Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Noyd* v. *McNamara*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967); *United States* v. *Voorhees*, 16 C.M.R. 83 (1954); *Dash* v. *Commanding General*, 307 F. Supp. 849, 852-855 (D.S.C. 1969); *Beard* v. *Stahr*, 200 F. Supp. 766, 773-776 (D.D.C. 1961) (Holtzoff, J.), *vacated on other grounds*, 370 U.S. 41 (1962).

[38] *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *see Goldwasser* v. *Brown*, *supra* note 37, 135 U.S. App. D.C. at 230, 417 F.2d at 1177.

[39] *E.g.*, *Raderman* v. *Kaine*, 411 F.2d 1102 (2d Cir.), *cert. denied*, 396 U.S. 976 (1969); *Dash* v. *Commanding General*, *supra* note 37.

[40] *E.g.*, *United Public Workers* v. *Mitchell*, 330 U.S. 75, 95, 103 (1947).

> their officers and their manner of discipline do serve an essential function in safeguarding the country.[41]

And the Supreme Court has often justified this state of affairs, as for example in the following observation:

> The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.[42]

More specifically, both the Supreme Court and the military courts have held that the distinction between military and civilian life can be controlling when interpreting the scope of the religion clauses. In particular, we refer to *West Virginia State Board of Education* v. *Barnette*.[43] There the Court upheld the claim of a group of Jehovah's Witnesses that their children could not constitutionally be compelled to pledge allegiance to the flag in the public schools. In concluding its opinion the Court unequivocally condemned any governmental attempt to promote unanimity of politics, culture or religion. Remarking that "if there are any circumstances which permit an exception, they do not now occur to us," the Court nevertheless hastened to add:

> The Nation may raise armies and compel citizens to give military service. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.[44]

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[41] *Raderman* v. *Kaine*, *supra* note 39, 411 F.2d at 1104.

[42] *Burns* v. *Wilson*, *supra* note 37, 346 U.S. at 140.

[43] 319 U.S. 624 (1943). In this connection, *see also Schempp*, *supra* note 33, 374 U.S. at 213; *id.* at 296-299 (Brennan, J., concurring); *id.* at 306 (Goldberg, J. concurring).

[44] *Barnette*, *supra*, 319 U.S. at 642 n.19. *See also United States* v. *Cupp*, 24 C.M.R. 165 (1957) (Jehovah's Witness' refusal to salute not protected in military); *United States* v. *Morgan*, 17

The unique nature of this special military community is of crucial importance to this case for two reasons.[45] First, it underscores the special need to defer to military expertise on the question of the methods to be used in the effective training of military officers;[46] and second, it focuses attention on the fact that the Government's interest in the training and morale of its troops has often been held to be an important and valid state interest sufficient to justify limited restrictions on otherwise protected First Amendment freedoms.[47]

II. *The Establishment Clause*

A. *The Appropriate Test*

In *Schempp* the Court held that in determining whether state action violates the Establishment Clause:

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legisla-

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C.M.R. 584 (1954) (Jehovah's Witness' refusal to "present arms" not protected in military); *cf. United States* v. *Burry*, 36 C.M.R. 829 (1966) (refusal to work on Saturday sabbath); *United States* v. *Chadwell*, 36 C.M.R. 741 (1965) (refusal to be inoculated). Despite repeated assumptions to the contrary (amicus I brief, pp. 7, 8, 10) it is equally clear that *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969), is inapplicable in a military context. *Dash* v. *Commanding General*, *supra* note 37, 307 F. Supp. at 857.

[45] We note that amicus I concedes that "cadets in a military Academy . . . are a special community, and special communities present special problems" (amicus I brief, p. 10). *Cf. Goldwasser* v. *Brown*, *supra* note 37, 135 U.S. App. D.C. at 230, 417 F.2d at 1177.

[46] We emphasize that in addition to being members of the military, the cadets are preparing to become officers. That further distinguishes this situation from others which the courts have considered. *See Orloff* v. *Willoughby*, *supra* note 37, 345 U.S. at 90-91; *Beard* v. *Stahr*, *supra* note 37.

[47] *Goldwasser* v. *Brown*, *supra* note 37, 135 U.S. App. D.C. at 230, 417 F.2d at 1177.

> tive power . . . . That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[48]

The District Judge employed that test in the instant case. Appellants, however, contend that *Everson* v. *Board of Education*[49] established "certain categories of absolutely proscribed conduct."[50] They rely on the following language:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance.[51]

Appellants therefore conclude that the *Schempp* test "applies exclusively to those borderline practices not expressly proscribed in *Everson*."[52] That argument is completely devoid of merit. In *Walz* v. *Tax Commissioner*, *supra* note 32, Chief Justice Burger, writing for the majority (which included Justice Black, the author of *Everson*), flatly condemned the *Everson* language on which appellants rely. The Chief Justice emphasized that while *Everson* said a law could aid no religion, it allowed the State to do just that by upholding a school busing statute which helped children to attend church

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[48] *Schempp*, *supra* note 33, 374 U.S. at 222.

[49] 330 U.S. 15 (1946).

[50] Appellants' brief, p. 10.

[51] 330 U.S. at 16.

[52] Appellants' brief, p. 11; see *id.* at 7, 10, 21, 45. See also amicus I brief, pp. 17-21, 35, which also relies extensively on the *Everson* dicta that church attendance cannot be compelled by the Government.

schools.[53] The conclusion of the *Walz* Court vitiated whatever precedential value this *Everson* language might otherwise have possessed:

> The considerable internal inconsistency in the "Establishment" opinions of the Court derives from what . . . may have been too sweeping utterances . . . [that] have limited meaning as general principles . . . . The hazards of placing too much reliance on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in *Everson*.[54]

The inescapable teaching of the First Amendment cases is that *Everson*'s apparent *a priori* rejection of certain laws, though no doubt generally valid, must always be qualified by reference to the "purpose-effect" test. Indeed, the Supreme Court long ago concluded that *Everson* itself implicitly applied this standard and upheld the school busing statute because its "purpose and effect . . . was general welfare legislation." [55] Similarly, the Supreme Court held that Sunday closing laws were constitutional even though they adversely affected those whose religion forbade Saturday work because the "purpose and effect is not to aid religion but to set aside a day of rest." [56]

A review of First Amendment case law, therefore, makes it apparent that the *Schempp* articulation of the

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[53] 397 U.S. at 670.

[54] *Id.* at 668, 670.

[55] *McGowan* v. *Maryland*, 366 U.S. 420, 443-444 (1961).

[56] *McGowan*, *supra* note 55, 366 U.S. at 449. It was also apparent that these laws coerced many for whom the Sabbath was on Saturday to refrain from attending church or, at a minimum, made such attendance extremely expensive. *See Braunfield* v. *Brown*, 366 U.S. 599 (1961). In the same vein the Court has often proscribed individual actions deemed inimical to valid state interests even where such actions were motivated by religious convictions. *See, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Jacobsen* v. *Massachusetts*, 197 U.S. 11 (1905); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

"purpose-effect" test merely formalized a standard already applied implicitly in *Everson* and explicitly in *McGowan*. Any remaining doubt concerning its universal applicability was dispelled in *Walz* when the Court declared, without noting any exceptions, that the "purpose-effect" test applied to "*each*" [57] judgment under the religion clauses. We submit, therefore, that the constitutionality of the chapel attendance regulations must be judged by their purpose and effect.

B. *Relevant Case Law*

On its particular facts *Schempp* declared illegal the practice of morning prayer in the public schools. Apparently because of its superficial similarity to the case at bar, appellants principally rely on *Schempp* as authority for reversing the decision of the District Judge. Such reliance is manifestly misplaced.

To begin with, the opinions in *Schempp* make clear that that case must be limited to its facts.[58] Justice Clark, writing for the majority, emphasized the public school context of the case.[59] Justice Brennan, concurring, stressed that "religious exercises in the public schools present a unique problem." [60] He concluded:

> The scope of our holding is to be limited by [its] special circumstances . . . and by [the] particular dangers to church and state which religious exercises in the public schools present.[61]

Justice Goldberg echoed the sentiment that *Schempp* was strictly limited to its facts by stating unequivocally that *Schempp* meant "*only*" that:

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[57] 397 U.S. at 669 (emphasis added).

[58] The initial school prayer case, *Engel* v. *Vitale*, 370 U.S. 421 (1962), was even more limited than *Schempp* and is therefore of little precedential value here. *Cf.* appendix, *infra*, pp. 63-64.

[59] *Schempp*, *supra* note 33, 374 U.S. at 218, 221, 223-225.

[60] *Id.* at 296 (emphasis added).

[61] *Id.*

> The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff and authority, cannot realistically be termed simply "accommodation." [62]

It is immediately apparent, though eight Justices in *Schempp* found it necessary to say so explicitly, that a member of the armed services is in a situation far removed from and not at all analogous to that of a student in a public school classroom.[63] Any analogy to cadets at our military academies must be even more strained.[64] In the first place, "the public school is . . . the most pervasive means for promoting our common destiny," [65] while the military academies exist for a specific limited purpose and affect relatively few individuals at any given time.[66] In the second place, public schools teach children, whereas the service academies train young adults [67] selected to attend these institutions in part be-

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[62] *Id.* at 307 (emphasis added).

[63] *Id.* at 213, 297-299, 306.

[64] The appointment of military officers is a matter within the discretion of the President as Commander in Chief. The rights which one may exercise while contemporaneously seeking appointment to such a position of honor and trust are necessarily more limited than those rights which may be exercised by non-officer draftees. *Orloff* v. *Willoughby*, *supra* note 37; *cf. Beard* v. *Stahr*, *supra* note 37.

[65] *McCollum* v. *Board of Education*, *supra* note 34, 333 U.S. at 231 (Frankfurter, J., concurring).

[66] See Justice Frankfurter's discussion of the relative importance of the extent of the program questioned in *McCollum*, *supra* note 34, 333 U.S. at 225.

[67] The peculiar impact of peer-group pressure on the young has often been noted by both the courts and social scientists. *See, e.g.*, *McCollum*, *supra* note 34, 333 U.S. at 227-228 (Frankfurter, J., concurring); *Schempp*, *supra* note 33, 374 U.S. at 262-263 n.28, 290-

cause they have displayed leadership capacity. In the third place, and most importantly, state law *compels* student attendance at the public schools,[68] while attendance at the military academies is completely voluntary.[69] The ultimate constitutional significance of this tripartite distinction was best articulated by Justice Brennan in *Schempp*. He said that the distinction between "voluntary attendance at college of young adults" and "the compelled attendance of young children at elementary

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292 (Brennan, J., concurring), and authorities cited therein. This peer-group pressure is significant because it provides the coercive element without which the Court has been unwilling to find violations of the establishment clause. See notes 68, 69, 71, *infra*. It is of particular importance here, since it bears on the distinction between attendance and worship which we discuss at pp. 27-28, 40, *infra*.

[68] It is true that the Court has often said that the absence of governmental coercion is not an absolute defense to a claimed violation of the Establishment Clause. Even a cursory examination of the major Establishment cases, however, discloses almost unanimous agreement among the members of the Court that the concept of coercion is crucial to the decision-making process in this area. Thus in *McGowan* v. *Maryland*, *supra* note 55, 366 U.S. at 458, the Court concluded that Sunday closing laws would be invalid if their *purpose* was to use the state's *coercive* power to aid religion. *See also Schempp*, *supra* note 33, 374 U.S. at 223; *Engel* v. *Vitale*, *supra* note 58, 370 U.S. at 430-432 (specifically referred to time after time is the fact that state law compels attendance at elementary and high schools); *McCollum*, *supra* note 34, 333 U.S. at 212; *Zorach* v. *Clauson*, 343 U.S. 306, 311-312 (1952); *id.* at 315-318, (Black, J., dissenting); *id.* at 321 (Frankfurter, J., dissenting); *id.* at 323-324 (Jackson, J., dissenting). *See also* KAUPER, RELIGION AND THE CONSTITUTION 72 (1964); Choper, *Religion in the Public Schools*, 47 MINN. L. REV. 329, 343-350 (1963); Kurland, *The Regents' Prayer Case*, THE SUPREME COURT REVIEW (1962).

[69] *Hamilton* v. *Board of Regents*, 293 U.S. 245, 262 (1934); *id.* at 266 (Cardozo, J., writing for himself and Justices Brandeis and Stone, concurring). In *Hamilton* the entire Court emphasized that while the University of California compelled its students to take military training, no one compelled an individual to attend that university. Recognizing that the students involved could not afford to attend any private university in the State, the Court nevertheless concluded that the absence of state-compelled *attendance* was sufficient to insulate the State from the students' First Amendment claim. *Compare Wasson* v. *Trowbridge*, *supra* note 38.

and secondary schools . . . *warrants a difference in constitutional results.*" [70] What is more, he found the distinction between those two sets of facts to be "crucial to the resolution of" the establishment issue in *Schempp*.[71]

Equally important is the fact that *Schempp* involved extensive interaction between agents of the state and representatives of religion, while no such interaction between the academies and the churches exists here.[72] In the final analysis, however, the distinction of most compelling significance is that the "purpose" of required prayer in the public schools was to inculcate religious and spiritual ideals and *in that way* to promote purportedly secular goals such as unity, tolerance, respect, responsibility, loyalty, love, and conformity to the law. The ultimate teaching of the school prayer cases is that to be compatible with the First Amendment a state law must have a non-religious public purpose which can be achieved independently of any advancement of religion.[73] In this case the military training goal which the chapel regulations seek to implement has been and can be achieved regardless of any religious advancement.

It is thus apparent that the school prayer cases are so factually dissimilar to the instant case that any result here can be determined only by the specific application of the general purpose-effect test to the unique

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[70] 374 U.S. at 252-253 (emphasis added).

[71] *Id.* at 252. The factual patterns referred to by Justice Brennan were drawn from the earlier *Hamilton* and *Barnette* cases, both of which were decided exclusively on Free Exercise grounds. Justice Brennan's firm belief that their comparative teaching was crucial on the Establishment question, however, further underscores our view that the compulsory machinery of the public school system makes it peculiarly susceptible to violations of the Establishment Clause.

[72] This facet of the problem is discussed at length at pp. 33-34, *infra*.

[73] *McGowan*, *supra* note 55, 366 U.S. at 467 (Frankfurter, J., writing for himself and Justice Harlan, concurring). For an excellent discussion of this point *see* Choper, *supra* note 68, 47 MINN. L. REV. at 335-336.

requirement of chapel attendance at the service academies. We turn then to the facts of this case.

C. *The Purpose of the Regulations*

The trial judge held that the purpose of the chapel regulations was secular. In connection with this inquiry he stressed the historical-military context of these regulations and found that "the most cogent testimony . . . as might be expected, was given by those people directly charged with the training of future military leaders." [74] Those individuals were Admiral Moorer, then Chief of Naval Operations and now Chairman of the Joint Chiefs of Staff; Mr. Roger Kelley, Assistant Secretary of Defense in charge of manpower and reserve affairs; and Admiral Calvert, the Superintendent of the Naval Academy.[75] On the basis of their testimony the court concluded that if a military commander is to be an effective and responsible leader, he must respect and understand the religious feelings of his men. This is particularly true in combat situations where religious motivation is high and chaplains are rarely available. The sole purpose of chapel attendance is to develop in the cadets, through observation of the impact of religion on the lives of others during actual worship services, that sensitivity to religious emotion which is required of a military leader. The completely secular nature of that need is amply supported by other evidence of record. Specifically, the force of the regulations operates *only* to require that "the cadets . . . *attend* church or chapel services and . . . remain silent in keeping with the avowed purpose of the activity; they are not

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[74] Appendix, *infra*, p. 57. As we noted above, judicial deference to military expertise in areas involving the needs of military training is the explicit or implicit admonition of countless cases. See pp. 17-20, *supra*, and cases cited in notes 37-39, *supra*.

[75] Admiral Moorer and Assistant Secretary Kelley recited not only their own personal judgments but the institutional judgment of the United States Department of Defense. See transcript references at note 7, *supra*.

required to participate in the service or worship. The choice is left to each individual. There is no punishment for non-participation." [76] It follows that chapel attendance is not "aimed at the cultivation of religious faith or motivation, but [is] aimed rather at the complete training of future officers." [77]

The distinction between attendance and worship or belief is "crucial" for two reasons. First, it establishes that these regulations are consistent with the implicit rule of *Schempp* that the state may not validly characterize as secular a goal which depends for its achievement on the advancement of religious belief.[78] Second, it demonstrates that insofar as state coercion is here employed, it is not designed to affect religious belief and is therefore not that kind of coercion which is plainly forbidden by the Establishment Clause.[79]

Appellants do not deny that the chapel regulations require nothing more than attendance, nor do they deny that the only military experts who testified were unanimous in their judgment of the military purpose of, and the military need for, the mandatory chapel regulations.[80] Rather, appellants assert that the testimony of

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[76] Appendix, *infra*, p. 58.

[77] *Id.*

[78] *Schempp*, *supra* note 33, 374 U.S. at 279-281 (Brennan, J., concurring).

[79] *See authorities cited supra* note 68, particularly KAUPER, RELIGION AND THE CONSTITUTION at 72: "If compulsion is a key factor, then is the court not saying that the state cannot be a party to practices which have the effect of compelling the acceptance of religious ideas or exposing people to a compulsory religious practice at the possible expense of impairing their own freedom of conscience . . . [T]he rationale of establishment [may well be] that government cannot use its powers to *compel acceptance of belief*." Compare Griswold, *Absolute Is in the Dark*, 8 UTAH L. REV., 167, 176-177 (1963) (emphasis added).

[80] In other connections appellants do contend that there is no *legal* distinction between attendance and worship within the purview of the First Amendment (Appellants' brief, p. 45; amicus I brief, pp. 34-35). That contention is discussed at pp. 40-41, *infra*. They also contend that *other* regulations not there in issue (spe-

those military leaders, including that of Admiral Calvert whom appellants called as their own witness, was a "recent contrivance devised for purposes of defending this case, and raises grave and very disturbing doubts about the integrity and credibility of the government witnesses." [81] Not content with impugning the credibility of these witnesses, appellants declare that their testimony was "demonstrably false" and "patently absurd."[82] Appellants have thus allowed legitimate legal argument to give way to personal invective.[83] The extensive attack on these witnesses which appellants mount in their brief [84] is merely a repeat performance of contentions already made in the trial court.[85] They were properly rejected by the trial judge.[86]

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cifically those designed to permit cadets to change the service they originally choose to attend) may indirectly affect religious belief. Those regulations were utilized at trial in an attempt to impeach the testimony of government witnesses (*see, e.g.*, 6a Tr. 251-263). That attempt was unsuccessful. The "chapel-switching" regulations exist for administrative and policy reasons unconnected with the military's purpose in promulgating the *primary* chapel attendance regulations, which are the only ones involved here. *See also* footnote 134, *infra*.

[81] Appellants' brief, p. 12.

[82] Appellants' brief, p. 18.

[83] We commend to this Court's attention the biographical details which the record contains concerning these national leaders whom appellants here accuse of "false" testimony. See particularly 6 Tr. 171-172.

[84] Appellants' brief, pp. 12-30.

[85] The various publications, regulations and affidavits on which appellants rely were not only matters of record but were used by appellants on cross-examination of the witnesses they now condemn. The record shows that the witnesses patiently explained away the "inconsistencies" to which appellants persistently point. *See, e.g.*, 5 Tr. pp. 88-90; 6 Tr. 237-246; 6a Tr. 263-267.

[86] The trial judge's determination of credibility is, of course, controlling here. We are confused by appellants' contention that this Court can and should make a *de novo* examination of the record (appellants' brief, p. 12). If appellants mean that on Establishment questions the appellate courts are to decide issues

On this question we make two concluding comments. First, the witnesses who testified to the secular purpose of the chapel requirement rendered not mere abstract judgments but conclusions based on examples drawn from their own experience as military commanders (1a Tr. 7-8; 5 Tr. 126-130; 6 Tr. 210-211). Surely appellants do not deny that these men encountered in combat the religious problems to which they testified. Second, appellants' *assume* that the expressed military purpose is "patently absurd" but advance no justification for that assumption.[87] In this connection, in addition to the support provided by the real-life examples described by the witnesses, the rationality of the military purpose was underscored in an analogous context by no less an authority than Erwin Griswold, then Dean of the Harvard Law School, who in discussing the school prayer cases concluded that, were prayer permitted, the child of a nonconforming minority religious group member would allow "the majority of the group to follow their own traditions, perhaps coming to *understand* and to *respect* what [the majority] feel[s] is significant to them."[88] None of appellants' witnesses denied the secular purpose of the regulations. Appellants cannot sustain their burden here by assuming away unequivocal and uncontroverted testimony concerning that purpose.

D. *The Effect Of The Regulations*

The trial judge found that the primary effect of attendance was to produce a military leader who understood and respected the religious feelings of his men and was therefore capable of effectively responding to

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of credibility, then their argument is on its face completely contrary to law. Of the cases cited by appellants, suffice it to say that not a single one deals with the Religion Clauses of the First Amendment.

[87] Appellants' brief, p. 13.

[88] Griswold, *supra* note 79, 8 UTAH L. REV. at 177.

such emotions.[89] This ability enhances his leadership capability while ensuring that those serving under his command will find their religious needs "accommodated" in a responsible way.[90] Most significantly, the desired secular (*i.e.*, military) effect is achieved, both theoretically and in fact, regardless of whether an individual himself believes in any religion or in no religion.[91]

In attacking this conclusion, appellants do not deny that the academies produce excellent military leaders. They do not deny, nor could they, that the personal experiences of the Government witnesses demonstrate that compulsory chapel is *an* effective method for equipping a combat leader to deal with religious problems which occur.[92] Rather, they argue that these regulations have a "devastating" adverse impact on religion.[93] By implication, they conclude that the effect on religion out-

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[89] The trial judge's discussion of the "primary effect" of the regulations, together with his quotation of relevant portions of the transcript, is found at pp. 60-61, *infra*.

[90] It is important to remember that inculcating understanding and respect for religion also serves an important function with respect to the inductee possessed of strong religious convictions. Where the military has the power to conscript and to subject a draftee to the broad authority of military discipline, does it not also have the responsibility to see to it—quite aside from the question of military effectiveness—that feelings as basic as religious convictions are respected and, where possible, shown the deference to which they are no doubt entitled? We are reminded of Mr. Justice Frankfurter's comment in *McGowan* v. *Maryland:*

> As the State's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. *McGowan, supra* note 55, 366 U.S. at 461.

[91] See especially Admiral Calvert's testimony that, since he was not a religious man, it was *only* his compelled attendance at the Academy Chapel which permitted him effectively to meet the needs of his men during crisis situations in World War II (1a Tr. 8).

[92] It is also significant that appellants have never disputed the fact that religious needs are often manifest in crisis situations, nor have they denied that an effective leader must be able to respond to such needs in an appropriate fashion.

[93] Appellants' brief, pp. 7, 22.

weighs the secular-military effect and is therefore "primary."

We submit first that "once it is determined that a challenged state interest is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied." [94] Appellants *assume* that whether the "primary" effect of the regulation is religious must be determined by evaluating the proportionate impact of the regulation on military training on the one hand and religion on the other. That is not the law. Rather, the "primary" effect of the law is secular if the "secular ends which it purportedly serves are . . . wholly independent of the advancement of religion." [95] In short, the primary-effect test acts merely as a legal check on the legislative intent of the state.[96] Thus the Court, while admitting that religion was "aided" by laws providing for the purchase of textbooks [97] for, and the payment of bus fare [98] to, parochial school students, as well as by tax exemptions [99] for religion, has not found it necessary to "weigh" the extent of that religious aid against the benefit to the "general welfare" which such laws also promoted. The only caveat to this rule of which we are aware is that, even where the purpose and

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[94] *McGowan, supra* note 55, 366 U.S. at 466 (Frankfurter, J., writing for himself and Justice Harlan, concurring). Nor did the majority in *McGowan* weigh, or even discuss, the adverse impact of the Sunday closing laws on religions whose Sabbaths did not fall on Sunday. *See also* footnotes 97-99, *infra*.

[95] *Id.* at 466.

[96] The educators in *Schempp* may well, for example, have testified in all good faith that the purpose and effect of school prayer was secular. But because achievement of that effect could only be derived from the successful inculcation of religious ideals and belief, the "primary" effect (or purpose, depending on one's perspective) was "religious" as a matter of law.

[97] *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

[98] *Everson, supra* note 49.

[99] *Walz, supra* note 32.

effect of the law may be characterized as secular, the Court is also concerned that no situation should be created in which there is such extensive interaction between the agents of the state and the representatives of religion that a resulting "entanglement" is created which itself is an effect prohibited by the First Amendment.[100] No such interaction is present here. On the contrary, the content of the religious services is the exclusive concern of the religious leaders who conduct them, and the services, except where held on academy grounds because of geographical necessity rather than any state design,[101] are conducted off-campus at local churches. The exclusive concern of the academies, on the other hand, is attendance.[102] Thus the proscribed "entanglement" is absent.[103] This absence of prohibited church-state inter-

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[100] *Walz, supra* note 32, 397 U.S. at 674; *Zorach, supra* note 68; *McCollum* v. *Board of Education, supra* note 34. Though church-state "entanglement" was not ultimately dispositive in *Schempp* as in the cases here cited, the *Schempp* Court did emphasize that compulsory state machinery required attendance at school, that the content of the religious exercises was prescribed by the state and that the exercises were held in state buildings under the supervision of teachers employed by the state. *Cf.* appendix, *infra*, p. 56.

[101] A chapel is available at each of the academies to provide that "opportunity" to worship which is required by the Free Exercise clause. *See Schempp, supra* note 33, 374 U.S. at 289-292 (Brennan, J., concurring); *id.* at 306 (Goldberg, J., concurring). West Point provides Catholic, Jewish and Protestant services on campus because, unlike the Naval and Air Force Academies, it is not located in or near any town. A non-denominational chapel at the Naval and Air Force Academies exists in part for those whose particular denomination is not represented in Annapolis or Colorado Springs. It is clear that no constitutional impropriety can be caused by the accidental presence or absence of particular religious sects in these towns. *See Everson, supra* note 49, 330 U.S. at 4 n.2. In *Everson* by law, aid went only to the parents of children attending Catholic and public schools, but the Court found no constitutional violation because there was no evidence that, in fact, any other non-public schools existed in the area.

[102] Cadets assemble in "chapel formation" on academy grounds prior to leaving for church, and attendance is taken at that time.

[103] The minimal factual distinctions on the degree of church-state "entanglement" which led to opposite results in the released-time

action, coupled with a secular purpose which is achieved independently of any necessary advancement or inhibition of religion, is sufficient to meet the primary-effect test.

Assuming *arguendo* a need to assess the relative effect of the chapel regulations on religion and non-religion (in this case the training of military officers), the record makes clear that any religious impact of these regulations is minimal. It is, of course, obvious that religion may occasionally be aided in that a cadet who would not otherwise be present may be inspired by a particular service and elect to adhere to a particular religion. Appellants, however, appear to concede that such "aid" is insubstantial.[104] They concentrate their attack on the "devastating" harm which religion itself has suffered because of the chapel regulations.[105] At the outset one may wonder that there are no obvious signs of this "devastation" after the cumulative impact of 150 years of mandatory chapel. Ignoring this absence of historical support, appellants first contend that religion is harmed because the regulations are inconsistent with the tenets of many faiths. So, of course, are liberal abortion and divorce laws and compulsory health and education laws, but it is apparent that no establishment problems result.[106] Moreover, as appellants themselves point out,[107]

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cases emphasizes the significance of the factual disparities outlined above. *Compare Zorach, supra* note 68, *with McCollum, supra* note 34. In this connection we note appellants' exaggerated concern that cadets at the Air Force Academy may attend only those local churches which are adjudged to be "established" and "cooperating". That such regulations are consistent with the First Amendment in the absence of any showing of discrimination was definitively established in *Zorach*, where students were allowed to attend only those religious classes which were "conducted by or under the control of a duly constituted religious body." 343 U.S. at 308 n.1.

[104] See appellants' brief, p. 7.

[105] Appellants' brief, pp. 7, 22.

[106] *See McGowan, supra* note 55, 366 U.S. at 442.

[107] Appellants' brief, p. 24: The basic reason for the opposition of organized religion to this requirement "is that compulsory

the basic reason for this claimed inconsistency derives from an inability or unwillingness to distinguish between attendance and worship. We agree that forced worship is repugnant not only to most organized religion but to the First Amendment as well. The problem with appellants' argument is that the regulation in question requires nothing more than *attendance*. Appellants finally argue that large numbers of academy graduates have been turned away from religion because of the chapel rule.[108] The record will not support that conclusion.[109] None of appellants' clerical witnesses had any familiarity with the academies, and only Reverend Jones had known many academy graduates.[110] Appellants pro-

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worship is itself a contradiction in terms. *Worship* . . . must be free." [Emphasis added.] We stress that none of the religious leaders who testified on appellants' behalf were acquainted with and of the service academies, and only one had had any extensive contact with academy graduates. The simple incontrovertible fact is that worship is not required and therefore the testimony of these religious leaders is largely irrelevant.

[108] Appellants and amicus I also argue that large numbers of sleeping and magazine-reading observers, or simply the presence of non-worshiping cadets who *ipso facto* become "Government agents" whose function is to keep religious services under "surveillance," cannot help but have a dramatic inhibiting effect on the worshipping congregation. Appellants' brief, p. 24; amicus I, pp. 26-29. Those arguments, we submit, are more imaginative than authoritative. *Compare Board of Education* v. *Allen, supra* note 97, 392 U.S. at 245; *Everson, supra*, 330 U.S. at 4 n.2.

[109] In this connection it is important that cadets may be excused from chapel for "sincerely held reasons" (appendix, *infra*, p. 63). While such an excusal provision does not constitute a defense to a claimed violation of the Establishment Clause, it obviously operates to reduce any adverse impact on religion which might otherwise appear. With respect to amicus' contention that "there is nothing in the record showing that any cadet has ever been exempted" (amicus I brief, p. 32), we note that the record demonstrates that at least four individuals including one of appellants' own witnesses have in fact been excused (2 Tr. 114, 129; 4 Tr. 427).

[110] See p. 13, *supra*. Reverend Jones' conclusion was specifically rejected by Admiral Moorer on the basis of forty-one years in the Navy and a knowledge of some 25,000 academy graduates (6 Tr. 204-205, 216).

duced only five academy students or graduates who testified that they found the chapel services "offensive," and one of these had been excused from attendance.[111] Finally, appellants place great reliance on a survey of cadet opinion at West Point conducted by a cadet who was not present to testify.[112] We respectfully submit that such reliance is not only misplaced but inappropriate since the trial court refused to admit that survey into evidence.[113] Not surprisingly, the court concluded:

> The plaintiffs [appellants] adduced testimony that the mandatory attendance will have some religious effect on some of the cadets. [They] failed, however, to demonstrate that the effect is anything but slight, insubstantial, and non-extensive. Appendix, *infra*, p. 62.

That kind of minimal effect is insufficient under any test to void a regulation, the primary effect of which is to produce fully trained military leaders essential to the national defense.

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[111] Despite the fact of his excusal (4 Tr. 427), appellants inexplicably continue to assert that the claim that one can be excused from chapel attendance is a "sham". Appellants' brief, p. 31; compare footnote 109, *supra*.

[112] Appellants' brief, p. 29.

[113] Later in their brief appellants argue that the trial judge erred in excluding that survey (appellants' brief, pp. 47-49). A trial judge has wide discretion on whether to admit this type of evidence. See Annot., 76 A.L.R.2d 619-670 (1961). The record makes clear that the court's decision to exclude the survey here in question was entirely within the appropriate boundaries of that discretion (7 Tr. 375-416; 8 Tr. 418-451). *Bank of Utah* v. *Commercial Sec. Bank*, 369 F.2d 19, 27 (10 Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); *American Luggage Works, Inc.* v. *United States Trunk Co.*, 158 F. Supp. 50, 52 (D. Mass. 1957), *aff'd sub. nom. Hawley Products Co.* v. *United States Trunk Co.*, 259 F.2d 69, 77 (1 Cir. 1958); *Sears, Roebuck & Co.* v. *All State Life Ins. Co.*, 246 F.2d 161, 171-172 (5th Cir. 1957), *cert. denied*, 355 U.S. 894 (1957); *DuPont Cellophane Co.* v. *Waxed Products Co.*, 6 F. Supp. 859, 884-885 (E.D.N.Y. 1934), mod. on other grounds, 85 F.2d 75 (2d Cir.), *cert. denied*, 299 U.S. 601 (1936).

E. *The Availability of Secular Means to Achieve the End Sought by the Military*

Appellants argue that regardless of the purpose and the primary effect of the regulation, the Government is constitutionally compelled to achieve its goal, if possible, by using methods which have *no* effect on religion. Thus, conclude appellants, religion should be taught in the classroom.[114] Whatever may be the abstract merit of this legal proposition, we submit that its application to this case supports the ruling of the District Judge.

The trial judge held that compulsory chapel was necessary to attain the training objective sought by "military experts." Specifically, he held that the substitution of "lectures or courses in moral guidance, comparative religion, or ethics would not achieve the same result as [chapel] attendance since the crucial element of observation would have been removed." Appendix, *infra*, p. 59; *cf.* p. 64. In this connection, Assistant Secretary Kelley testified that a class in religion

> simply provides the intellectual pieces of the religions of the world. It fails to provide the individual students with any particular insight or understanding of the convictions held by other individuals (5 Tr. 87).

Secretary Kelley concluded that any substitution of a religion class for the chapel regulation would "remove

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[114] The extent to which the Court may determine the feasibility of such alternative means is severely limited. In *Zorach*, it seems clear that the state could have better pursued a policy of neutrality by releasing all students at the same time, directing only that those who wished to attend classes in religious instruction were free to do so. Thus the desire of organized religions to instruct their young members who attended public schools would have been accommodated while any pressure inherent in keeping in school those children who did not attend such instructions would have been eliminated. The Court, however, specifically refused to review the "wisdom" or "efficiency" of the system. 343 U.S. at 310. Similarly, alternatives to the Sunday closing laws (specifically, limited exemptions for those for whom the Sabbath was Saturday) were rejected in *Braunfield* even though the Court candidly admitted such alternatives might be "wiser." 366 U.S. at 608.

one of the very essential components of officer development, and thus weaken the fiber of officership in the services . . . and this could have a very harmful effect on national security" (5 Tr. 87).

Appellants castigate this testimony as "more in keeping with Mr. Kelley's prior employment as a public relations officer . . . than with his present position as Assistant Secretary of Defense" (appellants' brief, p. 35 n.12). Appellants also emphasize that Secretary Kelley's testimony "inspired" a "skeptical newspaper editorial in the Annapolis Evening Capital" (appellants' brief, p. 34 n.10). We do not comment on these "arguments" but turn first to appellants' analysis of the facts. That analysis assumes that the only testimony on this question was from Secretary Kelley (appellants' brief, p. 35). That is incorrect. Secretary Kelley's sentiments were supported by Admiral Moorer, who testified that a classroom program would not be as effective as chapel attendance because it would be "artificial . . . . [T]hat is not the way that people live and that people feel and so on with respect to religion. So . . . . it is better, by far, to . . . require the [cadets] to observe this in [the] real world . . ." (6 Tr. 192).[115] Appellants' sole (though twice stated) legal argument is that it was incumbent upon appellees to present "expert" testimony in this regard (appellants' brief, p. 35 and n.12). Appellants assert that appellees failed to do so and conclude that the testimony of the Assistant Secretary of Defense in charge of manpower concerning the requisites of military training and their relation to the national defense must be rejected because it is contrary to the testimony of "Rev. Earl Brill, a theologian and educator, whose field of expertise is the role of religion in higher education" (appellants' brief, p. 33). Admiral Moorer, of course, took precisely the same position as Secretary Kelley. We phrase

[115] We note that this emphasis on realistic training as opposed to classroom learning is typical of the military approach, where soldiers typically learn "in the field" that which arguably might be taught them in lectures or seminars.

our answer to appellants' "argument" in question form: if neither the Chairman of the Joint Chiefs of Staff nor the Assistant Secretary of Defense in charge of manpower is an "expert" in the area of military training and national defense, who is? Reverend Brill?

This Court has specifically recognized that the "instructional goals" of the military can best be defined and implemented by the military.[116] That rationale, we maintain, is controlling here.

III. *The Free Exercise Clause*

A valid Free Exercise claim requires a showing that a law has a *coercive* effect which operates against an individual in the *practice* of his religion.[117] The requisite coercion is absent here in two respects. First, no individual is compelled to attend any service academy. He may study at another educational institution to receive a college degree, and he may select another route to officership in the United States Armed Forces. This absence of initial coercion alone, while not dispositive on the Establishment question discussed above, removes the regulations from the proscriptions of the Free Exercise Clause.[118] Second, the chapel regulations in any event require only attendance. Since each cadet remains free to practice any religion or no religion, there is, by definition, no coerced religious practice.

Appellants dispute only the second of these propositions. While not denying the appropriateness of the "coerced practice" test, they argue that *Everson* renders constitutionally unacceptable any attempt to distinguish between attendance and worship.[119] The problem with

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[116] *Goldwasser* v. *Brown*, *supra* note 38, 135 U.S. App. D.C. at 230, 417 F.2d at 1178.

[117] *Schempp*, *supra* note 33, 374 U.S. at 223, cited in the District Court's opinion, appendix, p. 63, *infra*.

[118] *Hamilton* v. *Board of Regents*, *supra* note 69. *See also Orloff* v. *Willoughby*, *supra* note 37.

[119] See, *e.g.*, appellants' brief, p. 45; amicus I brief, pp. 34-35.

the argument is that the *Everson* language on which appellants rely was unequivocally rejected in *Walz* in an opinion joined in by the author of *Everson*.[120]

Amicus, on the other hand, finds solace in *Barnette*.[121] That case, however, decisively undercuts two positions taken by appellants and clearly demonstrates the appropriateness of the District Court's ruling. In the first place, the Court in *Barnette* explicitly noted that, while its holding was applicable in any foreseeable civilian situation, it did not apply to the military.[122] This recognition of the dramatic difference between the public schools and the military vitiates appellants' continued assumption that religion cases involving civilian situations can automatically be applied in a military context. In the second place, the students in *Barnette* were required not only to attend the flag salute exercise but to participate in it. The Court did not condemn coerced *attendance*; it rejected the state's power to compel *participation*.[123] The result was not to abolish the daily flag salute or to excuse complaining children from attendance.[124] The Court merely held that the state could not force a child to "affirm a belief" in that which he did not believe.[125] In the case at bar only attendance is required; religious practice remains unaffected. The distinction, we maintain, is controlling. However, even

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[120] See pp. 21-22, *supra*. Additionally we observe that *Everson* was an Establishment case and is therefore inappropriately cited on the question of Free Exercise.

[121] Amicus I brief, pp. 33-34.

[122] *Barnette*, *supra* note 43, 319 U.S. at 642 n.19.

[123] *Id.* at 630, 634-635.

[124] This was true even though the Court has often recognized that peer-group pressures inherently tend to coerce a *child* to *participate* despite his beliefs. *See* Choper, *supra* note 68, 47 MINN. L. REV. at 348, 410-411. The absence of such pressure here is significant.

[125] The distinction between attendance and participation is also generally supported by the many free exercise cases distinguishing between beliefs and acts. See, *e.g.*, the cases (except *McGowan*) cited in note 56, *supra*. *See also*, *Griswold*, *supra* note 79, UTAH L. REV. at 176-177.

if we assume that the chapel regulations indirectly affect religious *practice*, appellants would then have to establish that either the purpose or primary effect of the regulations is religious. As the Supreme Court said in *Braunfield*:

> If the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observation unless the state may accomplish its purpose by means which do not impose such a burden.[126]

Finally, we note that exemption, although not the remedy in *Barnette*, is a typical solution in a Free Exercise case.[127] Appellants merely *assume* that because excusal provisions do not remedy an Establishment Clause violation, they cannot remedy a Free Exercise Clause violation.[128] The point is significant because cadets may be relieved of the chapel attendance obligation for "sincerely held reasons."[129] Thus, even if a Free Exercise violation is found, appellants' remedy would at most be a refinement of existing excusal provisions.[130]

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[126] 366 U.S. at 607.

[127] *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398 (1963). Of course if the regulation has no valid secular purpose and in addition violates the Free Exercise Clause, the regulation must be abrogated. *See, e.g., Barnette, supra* note 43; *Braunfield, supra* note 56, 366 U.S. at 607; *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

[128] Appellants' brief, pp. 41-42, states that excusal is no defense and cites two Establishment cases. See also amicus I brief, pp. 33-34.

[129] The record refutes appellants' contention that such exemptions are a "sham" (appellants' brief, p. 31). See footnotes 12 and 109, *supra*.

[130] This analysis is complicated by the fact that the District Judge held this was a class action. While at this juncture we do not contest the validity of that ruling with respect to appellants' Establishment claim, we feel compelled to observe that, with respect to Free Exercise, the named appellants cannot represent all

Appellants argue that since mere attendance may be repugnant to some cadets who are deeply religious, the chapel regulations must *ipso facto* be unconstitutional.[121] Compulsory attendance, however, produces no "coercive effect . . . which operates against [any cadet] in the *practice* of his religion." [122] Moreover, even if such an effect is assumed, it is simply outweighed by the secular effect of the regulation.[123] Finally appellants, while implicitly conceding that the compulsory chapel regulations in no way limit a cadet's choice as to which church service he will attend, attack other regulations which are applicable should a cadet later decide to attend another service. The problem with that argument is that it does not deal with the subject matter of this litigation.[124] We respectfully submit that the record clearly supports the court's ruling on the only issue before it: the mandatory chapel regulations do not offend the Free Exercise Clause.

IV. *Article VI*

After a lengthy summary of Article VI [125] (appendix, *infra*, pp. 64-67), which we do not here repeat, the trial

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cadets. A Free Exercise violation requires a showing of "coerced practice." *Schempp, supra* note 33, 374 U.S. at 223. Thus, while a cadet might validly represent all cadets who are atheists or Catholics or Baptists (a more precisely defined class), no one cadet may represent, for Free Exercise purposes, all other cadets regardless of their religious persuasion. Rule 23(c)(4)(B), F.R. Civ. P. *See Shulman* v. *Ritzenberg*, 47 F.R.D. 202, 208-209 (D.D.C. 1969); *Fischer* v. *Kletz*, 41 F.R.D. 377, 384 (S.D.N.Y. 1966); *cf.* 3A J. Moore, Federal Practice §§ 23.04, 23.05 (2d ed. 1968).

[121] Appellants' brief, p. 36.

[122] *Schempp, supra* note 33, 374 U.S. at 223 (emphasis added).

[123] See discussion *supra*, pp. 34-36.

[124] At a minimum, such "chapel-switching" regulations are severable from the primary attendance regulations. Even the posited invalidity of the former would not control a constitutional decision on the propriety of the latter. See note 80, *supra*.

[125] Article VI, clause 3 of the Constitution provides in pertinent part:

[Footnote continued on page 43]

judge concluded that "the banning of the religious test oath . . . was to keep the Federal Government from creating an established religion." [126] The court concluded that since the chapel regulations did not tend to establish religion they were inherently incapable of violating Article VI.

Amicus I seeks to attack the court's historical analysis indirectly, arguing that Article VI cannot be incorporated in the Establishment Clause because the former would prevent Congress from barring atheists from public office while the latter would not.[127] That argument is legally incorrect since the Establishment Clause prohibits the "establishment" of religion at the expense of non-religion.[128] Thus, even when the problem is viewed from the perspective suggested by amicus, the inclusion of Article VI within the Establishment Clause is clear. Amicus' argument, however, is largely irrelevant. Here the government requires no "test oath" or other religious practice. Attendance alone is compelled. As for atheists, Admiral Calvert testified that an atheist not only could attend the academies and become an officer but could be a "good" officer provided that he understood and respected the religious beliefs of his men (1 Tr. 127). Article VI is therefore manifestly inapplicable to this case.[129]

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[125] [Continued]

> [N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

[126] The thrust of his ruling is that the First Amendment incorporated and went far beyond the protections embodied in Article VI.

[127] Amicus I brief, p. 36.

[128] *Schempp, supra* note 33.

[129] Appellants again argue (brief, p. 45) that, since there is no distinction between attendance and worship, the regulations in effect require religious worship as a prerequisite to a military commission. We have twice considered the obvious distinction involved here and reject appellants' contention on that basis. See pp. 27-28, 40-41, *supra*.

Summary

The nation has a valid and substantial interest in maintaining a well-trained and well-prepared military establishment. Vital to that interest is the leadership capability of military officers. While there are no cases precisely applicable to the situation here presented, the historical reluctance of the courts to interfere with matters of military training and their traditional deference to military judgments of national defense needs provides the perspective appropriate to its resolution.

The Establishment Clause is not violated by compelling Sunday chapel attendance at the church of one's choice. The purpose of the regulation is purely secular: to produce military officers whose leadership capacity is not compromised by an inability to respond to the religious needs and motivations of their men. The primary effect of the regulation has been to produce such leaders. Compulsory chapel on this record has been demonstrated to be the only way to produce this effect. Moreover, the achievement of this goal has not depended and does not depend on any concomitant advancement or inhibition of religion. Any accidential effects on religion have been slight and insubstantial. Appellants' case authority is not to the contrary. As for *Everson*, even Justice Black, its author, by joining in the opinion of the Court in *Walz*, has recently rejected the language upon which appellants continually rely. The school prayer cases are factually distinguishable in so many ways that their holdings cannot in any sense be controlling here.

Nor does compulsory chapel violate the Free Exercise Clause. Cadets are compelled only to attend a religious service. Participation is not required in any manner. Thus no true Free Exercise question is presented. Even if coerced practice is assumed to exist to a limited extent, such governmental action not directly affecting religious belief would be justified if motivated by a secular purpose and productive of a substantial secular effect.

Those criteria are met here. The only Free Exercise cases cited by appellants do not support their position. *Sherbert* v. *Verner* is largely irrelevant, and *Barnette* directly supports appellees' basic contentions.

Finally, there is no violation of Article VI. The prohibition against "test oaths" cannot be offended by a regulation which requires only *attendance* at a service, at least where the purpose of such a rule is secular. In any event, this article was designed to prevent religious establishment. If the Establishment Clause is not violated, *a fortiori* this section cannot be.

"We are a religious people whose institutions presuppose a Supreme Being." [140] Fewer than 3% of the people in the country profess no affiliation with any organized religion.[141] In recognizing that religious attachments of young men drafted to serve their country exist and therefore must be recognized and dealt with, the military acts in an eminently practical manner. In training officers to meet that need the military promotes the national defense. Both historically and legally that interest is decisive.

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[140] *Zorach, supra* note 68, 343 U.S. at 313.

[141] *Schempp, supra note* 38, 374 U.S. at 213.

CONCLUSION

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be affirmed.

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 169-70

MICHAEL B. ANDERSON, CADET, U.S.A., ET AL., PLAINTIFFS

v.

MELVIN R. LAIRD, ET AL., DEFENDANTS

OPINION AND ORDER

* * * *

I.

GENERAL STATEMENT

Plaintiffs, two cadets of the United States Military Academy and nine midshipmen [1] of the United States Naval Academy, brought this suit as a class action on behalf of all cadets and midshipmen [2] at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs,

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[1] Most midshipmen were minors and appeared through the Reverend Father Robert F. Drinan as "next friend." The defendants challenged the right of Father Drinan to appear for the minors absent a showing that the parents of the minors had been consulted and consented to such an appearance. Since the Court had ruled that the action was a class action it deemed the challenge immaterial and denied the motion to strike Father Drinan's appearance as next friend.

[2] The term "cadets" is hereinafter used to include not only the cadets at the West Point and the Air Force Academies but the midshipmen at Annapolis as well.

Colorado.[3] The defendants are the Secretary of Defense and the Secretaries of the Army, Air Force, and Navy.

Plaintiffs claim that the regulations of the Academies compelling Sunday attendance at Catholic, Protestant, or Jewish chapel services violate the Establishment/Free Exercise Clauses of the First Amendment and constitute a "religious test" in violation of Article VI of the Constitution. They urge that such compulsory attendance is contrary to the Supreme Court's declarations limiting governmental actions involving religion because compulsory attendance constitutes religious proselytizing and governmental support of religion. They also urge that mandatory attendance constitutes an establishment of religion and an interference with plaintiffs' free exercise of religion. Plaintiffs seek (1) a declaratory judgment that compulsory church or chapel attendance violates the above noted provisions of the Constitution, and (2) a permanent injunction forbidding the Academies from enforcing the regulations and from disciplining those cadets involved in this court action.

The applications for preliminary and permanent injunction were heard on a consolidated basis. The Court first took testimony and heard argument on whether the plaintiffs had exhausted their administrative remedies within the Academies before filing suit. The Court ruled that adequate and effective administrative remedies were not available and hence that the exhaustion doctrine was not available as a defense. Thereafter the Court completed testimony on the merits and took the case under advisement.

For the reasons appearing below the Court holds that the regulations requiring mandatory church or chapel attendance on Sunday violate neither the First Amend-

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[3] None of the named plaintiffs was a cadet at the Air Force Academy. The similarity of regulations at the three Academies and the similarity of cadet positions at each Academy brings the Air Force Academy within the confines of this suit held to be a class action pursuant to Rule 23 F.R.Civ.P. See Class Actions, Charles Alan Wright, 47 F.R.D. 169, 172, 174, 178 (1969).

ment to nor Article VI of the Constitution of the United States.

II.

THE CHAPEL REQUIREMENTS

There is no question that Sunday church or chapel attendance is required by all cadets attending the three service Academies.[4]

The West Point regulation provides:

> "Attendance at Chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel service on each Sunday, according to announced schedules." Regulations for the United States Cadet Corps of the United States Military Academy, Chapter 8, Section IV, paragraph 819.

Air Force Regulation No. 265-1 provides:

> "Attendance at an established church service is mandatory for those Second, Third and Fourth Classmen present for duty in the Cadet area."

Part II, Chapter 15, of the United States Naval Academy Regulations states:

> "1. The basic requirements concerning religious matters at the Naval Academy are:
>
> (a) All Midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times."

Violations of these regulations are punished in the same manner as violations of other regulations, i.e., by

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[4] Nor is there any question that prospective candidates for the service Academies, volunteers all, are on notice as to the behavior expected of them if accepted as officer candidates—including the requirement to attend Sunday services. They are so notified through the catalogs distributed to them when they apply. It might well be argued that the cadets by their own choice have imposed restrictions on their activities at the Academies. See *Raderman* v. *Kaine*, 411 F.2d 1102, 1104 (2nd Cir. 1969).

reprimands, demerits, punishment marching tours, confinement to quarters, and for repeated violations, expulsion.

There are slight variations in the respective Academy Regulations concerning alternative worship services available. At West Point, all cadets are required to attend one of the three services on the Academy premises, as there is no town nearby to provide other alternatives. At the Naval Academy; midshipmen are permitted to attend a denominational service in Annapolis in lieu of the Academy church or chapel service. At the Air Force Academy, a cadet may attend church in Colorado Springs which has been approved by the Senior Chaplain.

Cadets may change their regular attendance from one church or chapel service to another only after first securing the approval of the respective chaplains involved, and, if they are under twenty-one, the approval of their parents. The cadet must demonstrate a sincere desire to affiliate with the new church. Approval of requests to change chapel squads is not granted on a mere personal whim any more than requests to change muster, classes, or meals.

However, a cadet who has sincerely held convictions against church or chapel attendance itself may be excused from such attendance. It was so declared by the Superintendents of the Academies in April 1969 in a policy statement which said:

> "It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen." [5]

Thus when the effect on the individual cadet is opposite to that intended, i.e., when he becomes incapable of observing, assimilating or becoming involved with an understanding of the religious beliefs of men and finds himself turning away from an understanding of what their

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[5] The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, April 18, 1969 at 32.

religious belief and value systems are, then he is relieved from the attendance requirement.

The requirement of attendance at Sunday services at the service Academies reaches for its origins far back into the nineteenth century. West Point established its requirement as early as 1821; the Annapolis regulation dates back to 1853; and the Air Force Academy, following tradition, adopted a similar requirement when it was organized in 1955.

III.

THE FIRST AMENDMENT

The First Amendment to the Constitution provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

It is urged by the plaintiffs that the compulsory chapel requirements quoted above have a purpose which advances religion and have a primary effect which in some ways advances and in other ways inhibits religion in violation of the First Amendment.

The defendants on the other hand urge that the requirement to attend is not a requirement to worship; that the purpose of attendance is purely secular and an integral part of the military training accorded to the various groups of cadets, and that its primary effect is to instill in the cadets an understanding of the religious values which can at times motivate the men who will ultimately come under their command.

The conduct of the service Academies is a military activity (perhaps in the long run the most important military activity) of the United States. It is administered by the respective military services and Secretaries and under the overall responsibility of the Secretary of Defense.

Accordingly to put the issues in proper perspective it would seem appropriate, at the very outset, to note the

limitations which have traditionally guided the courts in dealing with matters military.

The Courts have always been reluctant to interfere in the management of the military services. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Nixon* v. *Secretary of Navy*, 422 F.2d 934 (2nd Cir. 1970); *Raderman* v. *Kaine*, 411 F.2d 1102 (2nd Cir. 1969); *Byrne* v. *Resor*, 412 F.2d 774 (3rd Cir. 1969); *Smith* v. *Resor*, 406 F.2d 141 (2nd Cir. 1969); *Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2nd Cir. 1968), *cert. denied* 394 U.S. 929 (1969); *Fox* v. *Brown*, 402 F.2d 837 (2nd Cir. 1968); *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967); *Noyd* v. *McNamara*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967); *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *Feliciano* v. *Laird*, 311 F.Supp. 791 (E.D. N.Y. 1970); *Dash* v. *Commanding General*, 307 F.Supp. 849 (D. S.C. 1969); *Arnheiter* v. *Ignatius*, 292 F.Supp. 911 (N.D. Calif. 1968); *Rand* v. *Glezer*, 288 F.Supp. 174 (D.Colo. 1968).

The problem here facing the Court is but one facet of the age-old problem of how to balance the requirements of the military and its needs for discipline and training with the Constitutionally protected rights and privileges of the civilian society.

Mr. Justice Harlan succinctly noted in *Noyd* v. *Bond*, 395 U.S. 683, 694 (1969) that

> "In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal."

As a guiding principle it can be said that the amount of judicial interference with the military should be limited; the amount of deference given the military in matters of discipline and training should be wide. As Mr. Justice Jackson commented:

> "[J]udges are not given the task of running the army . . . The military constitutes a specialized

> community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 93-94 (1953).[6]

The reason for this special treatment is the unique role which the military performs. Mr. Justice Black pointed out in *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955), and it was reemphasized by Mr. Justice Douglas in *O'Callahan* v. *Parker*, 395 U.S. 258, 262 (1969) that

> Unlike courts it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

Judge Latimer of the United States Court of Military Appeals in a similar vein has written "that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the conflicting rights of the serviceman . . . and the right of the Government to prepare for and pursue a war to a successful conclusion." *U.S.* v. *Voorhees*, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83 (1954). And in the same opinion, Chief Judge Quinn, while speaking strongly to the constitutional rights of men in uniform, pointed out that "there are differences between the civilian and military communities." *Id.* at 531.

A most forceful statement of the limitation on the judiciary when dealing with matters military comes from former Chief Justice Warren.

> "So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited.
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> * * * *
>
> ". . . [I]t is indisputable that the tradition of our country . . . has supported the military establish-

[6] Mr. Justice Harlan in a separate context also has emphasized the unique position of military personnel in American society. *Carrington* v. *Rash*, 380 U.S. 89, 100-01 (1965) (dissenting opinion)

ment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. *Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.*" [Emphasis supplied] Warren, *The Bill of Rights and the military*, 37 N.Y.U.L.Rev. 181, 186-7 (1962).

The Second Circuit, speaking to issues which parallel this case, has echoed the ideas of Chief Justice Warren,

> "*Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline and dismissal of the future officers of the military* . . . Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity—at times extreme—*is a matter of substantial national importance scarcely within the competence of the judiciary.*" (Emphasis supplied) *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

Of course it is uncontested that a member of the armed services retains certain fundamental rights notwithstanding his membership in the military. The Supreme Court has left no doubt as to the applicability of the Constitution to the Military establishment. *Burns* v. *Wilson*, 346 U.S. 137 (1953). And, as the Court of Military Appeals has said, "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *U.S.* v. *Jacoby*, 11 U.S.C.M.A. 428, 431-2, 29 C.M.R. 244, 246-7 (1960). However, it is equally clear that being a member of the armed services does curtail the assertion of certain constitutional rights.[7] As Chief

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[7] *Cf.* Kester, *Soldiers Who Insult The President, An Uneasy Look at Article 88 of The Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697, 1748 (1968).

Judge Quinn of the United States Court of Military Appeals wrote:

> "Service in the armed forces, in both war and peace, entails substantial restriction on fundamental rights." Quinn, *The U. S. Court of Military Appeals and Individual Rights in the Military Service*, 35 Notre Dame Law, 491, 493 (1960).

The Second Circuit has said, as to the rights of a member of the armed services:

> "Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will ceases to exist. He acts at the command of some person—not a representative of his own choice —who gives commands to him which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed services, their officers and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty." *Raderman* v. *Kaine*, 411 F.2d 1102, 1104 (2nd Cir. 1969).

There is nothing revolutionary in concluding that one logically distinguishable group in society enjoys more limited rights than ordinary individuals. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Meehan* v. *Macy*, 425 F.2d 469, 470 (D.C. Cir. 1968); *Ginsberg* v. *N.Y.*, 390 U.S. 629 (1968).

Nor is it revolutionary to say that First Amendment rights are not absolute. *Callison* v. *U.S.*, 413 F.2d 133, 136 (9th Cir. 1969). And although the Religion Clauses are couched in absolute terms, it is not realistically possible to have absolute or perfect separation and non-involvement. *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952).

The very existence of the clauses denotes an involvement of sorts. As the Chief Justice has said, ". . . [T]here is room for play in the joints productive of a benevolent neutrality . . ." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970). The Religion Clauses are in effect boundaries laid out to avoid excessive entanglement.

Tradition—and the continuous public acceptance of a practice—carries weight and demands recognition. The practice of compulsory chapel at the military academies did not arise only yesterday. There is an unbroken pattern of 150 years of mandatory chapel under the eyes of the President and the Congress,[8] the military authorities, and the public in general. Such tradition cannot be lightly discarded; and the longer its existence the greater its influence on the constitutional interpretation of the regulations involved.

As Judge (later Mr. Justice) Cardozo observed "Not lightly to be vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank*, 250 NY 136, 164 NE 882, 884 (1928). In the same vein is Mr. Justice Holmes' comment that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). In a later case, *Jackson* v. *Rosenbaum*, 260 U.S. 22, 31 (1922) Mr. Justice Holmes further reiterated the force of tradition in these words:

"[I]f a thing has been practised for two hundred

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[8] A Board of Visitors is constituted annually to each of the service academies. It is made up of the Chairman of the Committee on Armed Services of the Senate (or his designee); three other members of the Senate (two of whom are members of the Committee on Appropriations); the Chairman of the Committee on Armed Services of the House of Representatives (or his designee); four other members of the House of Representatives (two of whom are members of the Committee on Appropriations); and six persons designated by the President. Among their duties are to inquire into the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods and other matters relating to the Academy. The Board is required to report to the President within sixty days after its annual visit to each academy. Title 10 U.S. Code §§ 4355, 9355, 6968.

> years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

The Court recognizes of course that long continued use cannot turn a constitutional violation into a right. However, the purpose of a statute or regulation can change over the years from "the impermissible purpose of supporting religion" to the "permissible purpose of furthering overwhelmingly secular ends." *Abington School District* v. *Schempp*, 374 U.S. 203, 264 (1963) (Brennan, J. concurring); *Walz* v. *Tax Commission, supra*, 397 U.S. at 687, fn. 8 (Brennan, J. concurring).

The Court turns now to a closer examination of the chapel attendance regulations in relation to the Freedom of Religion Clauses of the Constitution.

In *Abington School District* v. *Schempp, supra*, 374 U.S. at 222, Mr. Justice Clark set down the test to be followed in determining whether the Freedom of Religion Clauses of the First Amendment have been violated. ". . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Chief Justice re-framed the issue in these words:

> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are *intended* to establish or interfere with religious beliefs and practices or have the effect of doing so." [Emphasis supplied] *Walz* v. *Tax Commission, supra*, 397 U.S. at 669.

The most cogent testimony as to "purpose" and "effect" of mandatory chapel attendance, as might be expected, was given by those people directly charged with the training of the cadets.

Among others, the defendants called upon Rear Admiral James Calvert, the Superintendent of the Naval Academy, Admiral Thomas Moorer, the then Chief of Naval Operations and now Chairman of the Joint Chiefs of Staff, and Mr. Roger Kelley, the Assistant Secretary

of Defense for Manpower and Reserve Affairs. They testified substantially as noted below.

The cadets are required only to *attend* church or chapel services and to remain attentive in keeping with the avowed purpose of the activity; they are not required to participate in the service or to worship. The choice is left to each individual.[9] There is no punishment for non-participation. The activities involved are not aimed at the cultivation of religious faith or motivation,[10] but are aimed rather at the complete training of future officers who in combat will shoulder awesome responsibilities. For this reason the young men who volunteer to become cadets submit themselves to a training program the rigors of which far exceed those of other institutions of higher learning. The Academies are called upon to educate and train as effective combat leaders these young men who represent the country's key reservoir of officer talent and who are expected to set and maintain the standards for performance and conduct of all commissioned officers. Particular emphasis is placed necessarily on inculcating a sense of duty, integrity, and moral responsibility. Experience has shown that these qualities and a sensitivity to the spiritual needs of men in times of combat crisis are essential in leading men in the face of danger. Why some men resort to religion or spiritual values as support and strength in times of extreme danger and trial must be understood by a commanding officer.

Within the overall training program of the academies the most effective method of inculcating this sensitivity is attendance at chapel or church services which provide the only opportunity to observe the impact that spiritual values have on the lives of men. It would be as incon-

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[9] When the age, maturity, and voluntary position of the individuals are considered, the problems of peer pressure and youthful minds which loomed large in the school prayer cases (*Engel* v. *Vitale*, 370 U.S. 421 (1962), *Abington School District* v. *Schempp*, *supra*, 374 U.S. 203) present no obstacle.

[10] *Cf.* Kayser, *Church and State: Cooperative Separation*, 60 Mich. L. Rev. 1, 31 (1961).

sistent with the responsibility the Academies have to train complete combat officers to ignore this necessity as it would be to ignore the more obvious physical and tactical education.

> "One of the most challenging aspects of officership is the ability to draw out the best in the people who are subordinate to that officer's command, and the ability to draw out the best in those people requires, beyond any question, an understanding of the spiritual value system that those people use as a basis for conducting their lives and this spiritual value system is put to the most rigorous test in military life, particularly in conditions of combat and crisis." [11]

Highly trained military leaders are essential to national security, and the understanding gleaned from chapel attendance is necessary to mold the well-trained officer. Without it a vital component of officer development would be missing causing a weakness in the fiber of the officer corps which in the long run would have a harmful effect on national security. Lectures or courses in moral guidance, comparative religion, or ethics would not achieve the same effect as attendance since the crucial element of observation would have been removed. Secretary Kelley testified:

> "The opportunity to observe others at worship is clear manifestation of the manner and the extent to which they draw upon God or a supernatural being in the conduct of their lives." [12]

Specifically as to the "*purpose*" of mandatory attendance Secretary Kelley further testified:

> "Very simply the reason for the requirement is to help the midshipmen and the cadets understand the basis of religious belief and practice on the part of other midshipmen and cadets and thus equip him for

[11] Testimony of Secretary Kelley, Tr. Vol. V at 28.

[12] Tr. Vol. V at 27.

positions of leadership responsibility in later service life."

And Admiral Moorer said:

"The purpose, of course, is to enhance his leadership and command ability by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a leader in later years, he will appreciate this impact that religion will have on so many people.

* * * *

"[T]hat is the sole purpose. We are in the process of developing leaders and this is a vital part of the overall leadership package; and that is the sole purpose."

Looking to the *primary effect* (as contrasted with purpose) the Chief Justice has pointed out that the end result—the effect—must not be "*excessive* governmental entanglement with religion. The test is inescapably one of degree." (Emphasis supplied) *Walz* v. *Tax Commission, supra,* 397 U.S. at 674.[13]

As Secretary Kelley testified:

"The institutional judgment of the Department of Defense as to the primary effect of required chapel attendance is to develop in those required to attend chapel an understanding of the religious beliefs and the spiritual value systems of other midshipmen and cadets . . .

"I meant primary effect of requiring attendance at chapel is to instill in a midshipman the understanding of the religious beliefs of others."

And Admiral Moorer added:

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[13] The Court of Appeals had one month earlier reached the same result in *Allen* v. *Hickel,* 424 F.2d 944, 949 (D.C. Cir. 1970)). "The question is not whether there is any religious effect at all but rather whether that effect, if present, is substantial."

"The primary effect is to generate in the individual a better understanding of the impact, related on the lives of men, and certainly permitting them in the future to be better leaders.

* * * *

"When we experience a crisis situation, different men react in different ways, and it is very important that the commander, or the senior man on the scene of the conflict or difficulty, understands why the various men in his command will react in a different way, and why some of them find a need to resort to religion to support them in this time of extreme danger and extreme trial. And unless he understands that many people have this feeling and have this need to resort to their religious beliefs to provide strength to them in this period of crisis, he cannot properly, in my view, handle this crisis situation."

As indicated earlier the Court is prepared to and does accord great weight to the opinions and the judgment of those military experts who have the responsibility of training and developing the country's future military leaders. In the absence of any compelling testimony to the contrary, it agrees with their evaluation that the purpose of required attendance at church or chapel service is wholly secular; that it is a vital part of the overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command. The Court also agrees that the primary effect of required attendance is secular in that it enables those who will one day hold command positions to gain an awareness and respect for the force religion has on the lives of men so as to react for the benefit of all in combat crises including the giving of spiritual counseling and guidance to those who turn to religion in such situations.

In according deference to the opinions and judgments of the military, the Court is not downgrading the testimony proffered by the plaintiffs. The plaintiffs introduced forceful testimony as to the negative effects of compulsory attendance at worship services upon mankind in general.

And it is undeniable that the plaintiffs adduced testimony that the mandatory attendance will have some religious effect on some of the cadets. The plaintiffs failed, however, to demonstrate that the effect is anything but slight, insubstantial, and non-extensive.[14] It is significant, too, that the testimony adduced by the plaintiffs was presented by persons who are not now and never have been directly concerned with the training of our military leaders. As moralists the Court must accord them due deference, but in matters military the Court feels constrained to look to the military experts.

With the foregoing testimony in mind, the Court concludes that the Religion Clauses of the First Amendment have not been breached by the chapel attendance requirement.

The Court first makes the necessary distinction between "attendance" and "worship" and holds that attendance under the circumstances in question does not constitute worship. While this distinction might be said to be slight, it is in this case crucial. As Chief Justice Burger has said, "[I]t is an essential part of adjudication to draw distinctions, including the fine ones, in the process of interpreting the Constitution." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 679.

The Court next finds that the purpose and primary effect of compulsory attendance cannot be said to either substantially "advance" or "inhibit" religion. The thrust is toward the complete training of a military leader. The effect of attendance is no different than the effect of other regulations which all blend together to mold the future officer. "The educational system at the service Academies is a total educational and training concept having to do with developing the whole man, the whole officer . . . There is an integration between the elements of the total system and each makes its own significant

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[14] As has been noted, *supra*, a cadet or midshipman may be excused from attendance for sincerely held reasons or beliefs.

contribution to developing the whole man-officer which equips him as a leader of men." [15]

Any advancement or inhibition, any sponsorship or hostility (and the Court finds none) would only be incidental. And if only incidental, it would be insufficient to hold it in violation of the Religion Clauses. As Mr. Justice Harlan wrote, concurring in *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968):

> "I would hold that where the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,' *Abington School District* v. *Schempp, supra*, 374 U.S. at 307 (concurring opinion of Goldberg, J.), it is not forbidden by the religious clauses of the First Amendment."

This mandatory attendance requirement also meets the test for the Free Exercise Clause as laid down in *Abington School District* v. *Schempp, supra*, 374 U.S. at 223. To come into conflict with the Clause it must be shown that there is a coercive effect which operates against the individual in the practice of his religion. These regulations in no way operate against a cadet in practicing his own religion or in practicing none. The individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons he can be excused from attendance.

Nor does compulsory chapel attendance violate the standards set down by Mr. Justice Brennan in his concurring opinion in *Abington School District* v. *Schempp, supra*, 374 U.S. at 203, and restated in *Walz* v. *Tax Commission, supra*, 397 U.S. at 680. Mr. Justice Brennan held that "those involvements of religious with secular institutions" are forbidden "which (a) serve the essentially religious activities of religious institutions; (b)

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[15] Testimony of Secretary Kelley, Tr. Vol. V at 37.

employ the organs of government for essentially religious purposes; or (c) essentially religious means to serve governmental ends, where secular means would suffice."

The attendance requirements do not "serve the essentially religious activities of religious institutions" as their principal effect is to carry out secular purposes—the training of future military leaders. Nor do they "employ the organs of government for essentially religous purposes." To the extent that the chapel attendance requirements further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the requirements, the benefit is passive. Nor do they "use essentially religious means to serve governmental ends, where secular means would suffice." To accomplish the end involved—the complete training of future military leaders—it is the judgment of military experts that secular means would not suffice. With this judgment the Court agrees.

As the Chief Justice has pointed out the Religion Clauses "mark boundaries" so as to "avoid excessive entanglement." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 670. The Court concludes that the involvement of these regulations with religion falls outside the boundaries. The Court accordingly affirmatively finds that church or chapel attendance is an integral and necessary part of the military training of the future officer corps, that its purpose is purely secular, and that its primary effect is purely secular.

IV.

ARTICLE VI

It is also claimed by the plaintiffs that mandatory church or chapel attendance imposes a "religious test" for officers in violation of Article VI of the Constitution. Article VI reads in pertinent part:

> "No religious test shall ever be required as a qualification to any office or public trust under the United States."

As there is no case law directly in point[16] the Court for guidance looks back to the historical context in which the Article was adopted.

When the Revolutionary War began, England and every American colony with the exception of Rhode Island had an "established church" or "established religion."[17] However, by the time of the Constitutional Convention eleven years later strong support had developed for the proposition that no person should be denied political rights because he did not share the religious beliefs of the majority.[18]

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[16] The Supreme Court did briefly discuss Article VI and the religious test oath in *Torcaso* v. *Watkins*, 367 U.S. 488, 490-491 (1961) but decided the case on First Amendment grounds since the plaintiff held state rather than federal office.

[17] "There were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale*, 370 U.S. 428. See generally S. Cobb, The Rise of Religious Liberty in America (1902) and C. Antieau, A. Downey and E. Roberts, Freedom from Federal Establishment (1964).

By "Establishment" was meant any alliance between church and state which could have one or more of the following characteristics:

> "1. A state church officially recognized and protected by the sovereign;
>
> 2. *A state church whose members alone were eligible to vote, to hold public office, and to practice a profession;*
>
> 3. A state church which compelled religious orthodoxy under penalty of fine and imprisonment;
>
> 4. A state church willing to expel dissenters from the commonwealth;
>
> 5. A state church financed by taxes upon all members of the community;
>
> 6. A state church which alone could freely hold public worship and evangelize;
>
> 7. A state church which alone could perform valid marriages, burials, etc." [Emphasis supplied] C. Antieau, A. Downey, E. Roberts, Freedom from Federal Establishment, *supra*, at 1.

[18] But in only two of the thirteen states, Rhode Island and Virginia, was full and perfect freedom of religion conceded by law. S. Cobb, The Rise of Religious Liberty in America, *supra*, at 482-509.

The Founding Fathers were in accord with this view and were determined that the Federal Government should have no grant of delegated power to deal with religion. Lack of delegation it was felt would remove "the fundamental power of religious establishment: the ability to control the political process through interference in the claims of conscience." [19]

However, when the Convention reached the question of granting Congress the power to establish qualifications for federal office the problem of a religious test oath arose. Such oaths had been prevelant in every colony but Rhode Island; and while there were variations in the groups restricted, most made belief in some Protestant sect a requirement.[20] New Jersey as the first colony to adopt a constitution set the example.

> "[A]ll persons professing a belief in the faith of any Protestant sect . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects." F. Thorpe, American Charters, Constitutions and Organic Laws, Vol. V, at 2597 (1909).

The effect of these religious test oaths was to prevent those who did not profess belief in the established church or religion of the state from exercising the basic political and economic rights of voting, holding office, practicing a profession, or becoming an officer in the militia.[21]

It was against this background that the religious test oath was accepted by the Convention. It was based upon the Founding Fathers' fear that the power to determine the qualifications for office might carry with it by deriva-

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[19] C. Antieau, A. Downey and E. Roberts, Freedom from Federal Establishment, *supra*, at 110.

[20] *Id.* at 92-110.

[21] *Id.* at 10-16.

tion or implication the power to use religion as a basis for qualification.[22] And this they wanted to prevent.

It is clear from the history behind the adoption of the clause and from the subsequent debates in the state ratifying conventions that the banning of the religious test oath in the Constitution was to keep the Federal Government from creating an established religion.[23]

Thus, from an historical standpoint there is a close connection between the establishment prohibition and the test oath prohibition. The Court having determined that there is no violation of the Establishment Clause in the mandatory attendance regulations, it necessarily follows that there can be no violation of the test oath prohibition.

Further and as a practical matter if one considers that the Academy graduates constitute less than five percent of the officer corps, it can hardly be said that the Academy regulations interpose a test which prevents others from becoming officers in the armed services of the United States. The Court accordingly finds these regulations not to be a religious test and not a violation of Article VI.

This opinion constitutes the Court's findings of fact and conclusions of law.

V.

ORDER

In the light of the foregoing it is hereby ORDERED:

(1) Plaintiffs' motion for a declaratory judgment that compulsory chapel attendance violates the Constitution is denied.

(2) Plaintiffs' motion for a permanent injunction forbidding the Academies from enforcing the requirement, is denied.

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[22] *Id.* at 99.

[23] Elliot's Debates, II, 149, 202; Elliot's Debates, III, 204; S. Cobb, The Rise of Religious Liberty in America, *supra*, at 508.

(3) Plaintiffs' motion for a permanent injunction forbidding the Academies from disciplining the cadets and midshipmen for their involvement in this suit, is granted.

/s/ Howard F. Corcoran
JUDGE

DATED: July 31, 1970.

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No. 24,617

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL B. ANDERSON, Cadet, U.S.A., *et al.*,

Appellants,

v.

MELVIN R. LAIRD,
Secretary of Defense of the U.S.A., *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF

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CONTENTS

TABLE OF CASES

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APPELLANTS' REPLY BRIEF

I. THE LEGACY OF *EVERSON*

Appellants contend that in view of the express proscriptions of *Everson v. Board of Education*, 330 U.S. 15 (1946) relating to church attendance, the compulsory chapel regulations must fall before the First Amendment without having to resort to the purpose/primary effect test of *Schempp*. The relevant

language, reaffirmed in almost every Establishment Clause case[1] subsequent to *Everson*, is as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this. Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force or influence a person to go to or to remain away from church* against his will or force him to profess a belief or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." *Everson*, 330 U.S. at 16 (emphasis added).

The Government contends that the Supreme Court in *Walz v. Tax Commissioner*[2] "flatly condemned the *Everson* language on which appellants rely".[3] Careful examination of that opinion indicates that this is a misreading

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[1] *Board of Education v. Allen*, 392 U.S. 236, 242 (1968); *Torcaso v. Watkins*, 367 U.S. 488, 492-3 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Zorach v. Clausen*, 343 U.S. 306, 314-15 (1952); *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948).

[2] 397 U.S. 664 (1970).

[3] Appellees' brief, pages 21, 39-40. Since the filing of appellants' brief, appellants' counsel has received proof sheets of a forthcoming comment in the December issue of the NYU Law Review discussing the opinion of the District Court on this specific issue and others. (Comment, 'Required Chapel Attendance", NYU Law Review, December 1970, Volume 45: 1286-1302). Because this article is not yet generally available, and deals in depth with many if not most of the issues in this case, it is reproduced as an addendum to this brief.

of *Walz* and that the Government has far outstripped the high Court in its zeal to repeal *Everson.*

Chief Justice Burger, speaking for the Court in *Walz,* was careful to limit his reference to Everson to the general "aiding" provision:

> "Neither a State nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." *Walz, supra,* 397 U.S. at 670.

The Chief Justice then went on to illustrate the proposition that "aiding" is a relative concept, and that even in *Everson,* the permitted activity involved some slight degree of aid to church schools. The Chief Justice took pains to omit from his quotation the specific prohibition against "setting up" of a church, and he carefully terminated his quotation short of the remaining specific prohibitions. Nothing in his opinion, or in the concurring opinions in *Walz,* lends any support to the Government's contention that the specific prohibitions in Justice Black's now historic summary of the limits of governmental action under the Establishment Clause have been abolished. The *Walz* opinion, accordingly, not only fails to "flatly condemn" the *Everson* language upon which appellants rely, but indicates that no tampering or dilution of the specific proscriptions was intended.[4]

Indeed, Chief Justice Burger's opinion makes clear that the kinds of acts specifically proscribed in *Everson* are still beyond the purview of governmental action, regardless of their purpose or effect.

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[4] What renders the Government's position on this point untenable is that it proves too much. If it were true that all government action was limited only by the purpose/primary effect test, this would mean that the Federal Government or some state government, claiming some secular purpose and effect, could properly set up a church, or force persons to profess or punish them for refusing to profess religious beliefs. Merely to state such a hypothesis is to demonstrate its fallacy.

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those *expressly proscribed governmental acts* there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U.S. at 669.

A comparison of Chief Justice Burger's formulation in *Walz*, speaking for a majority which included Justice Black, with Justice Black's formulation in *Everson* indicates that the former is merely a shorthand summary of the latter. The "expressly proscribed governmental acts" which the Chief Justice summarized as "governmentally established religion or governmental interference with religion" can be none other than those several specifically forbidden acts previously enunciated in *Everson*: setting up a church; forcing persons to profess a religious belief or attend church or punishing them for refusing to profess or attend; levying a tax to support religious activities;[5] or participation by the State in the internal affairs of religious organizations.

As the *Walz* opinion makes clear, it is only in matters "short of those expressly proscribed governmental acts" that there arises any occasion to measure the "play in the joints" of the church/state nexus. Only in the case of less patent violations of the First Amendment is there any need to inquire into their purpose or primary effect.

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5 "General subsidies of religious activities would, of course, constitute unpermissible state involvement with religion." (Concurring opinion of Brennan, J. in *Walz*, *supra*, 397 U.S. at 690).

Accordingly, we submit that the express proscriptions of *Everson,* far from being "condemned" in *Walz,* have, in fact, been reaffirmed for the fifth time since they were first articulated more than two decades ago. Since the chapel attendance requirement falls squarely within those proscriptions, we submit that there is no necessity in this case for this Court to reach the more complex issues of purpose and primary effect.

II. THE PURPOSE OF THE MANDATORY CHAPEL REQUIREMENT

The Government asserts that in the "unanimous opinion" of the Government witnesses, the purpose of the chapel requirements is the secular one of enabling future officers to see and understand how others worship so that they will be better able to understand and minister to the religious needs of their men in combat.[6] Patently, the stated purpose is a contrived one.

In the first place, we think that the issue of purpose is not and should not be a matter of "opinion", but a question of fact. This fact – like all facts – must be determined from all of the available evidence. In this case, the extensive documentary evidence of the religious purpose of the requirement[7] (which the Government chooses to ignore) indicates clearly that the newly-contended secular purpose is definitely *not* the "unanimous"–ly held purpose of the Department of Defense. The Government takes appellants to task for questioning the credibility of the Government witnesses on this point, but we submit that a review of the documentary evidence previously cited, including policy statements and academy catalogues – all published by the Department of Defense – leaves no room for any conclusion other than that the alleged secular purpose was first formulated only after this case was filed.

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[6] Appellees' brief, page 7.

[7] Appellants' brief, pages 12-20.

Wholly apart from the fact that the alleged secular purpose is flatly contradicted by the statement of policy issued by the Inspector General of the Army,[8] the academy catalogues,[9] the 1969 position paper issued by the Conference of Academy Superintendents,[10] the affidavits filed originally in this action by the academy superintendents,[11] the academy regulations themselves,[12] and the statements of the Senior Chaplain of the Naval Academy[13] and the Commander of the Chaplain Corps of the U.S. Navy,[14] it is apparent that the stated purpose is so inherently inconsistent with other regulations and so tenuously connected with the means of achieval as to be unworthy of belief. How, for example, can this purpose be reconciled with the regulation barring chapel switching except upon "a sincere desire to affiliate with the [new] denomination?"[15] Why must a cadet desiring to change chapels first secure the permission of his parents and of both chaplains involved?[16] Why is chapel attendance not required of the more than 95% of military officers who do not come from the academies, but who are, presumably, as much in need of understanding and coping with the religious needs of their men in times of stress?[17]

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8 Plaintiffs' Exhibit 39, Appendix 154.

9 Plaintiffs' Exhibit 30, Appendix 145; Plaintiff's Exhibit 32, Appendix 148.

10 Plaintiffs' Exhibit 10, Appendix 133.

11 Affidavit of Lieutenant General Thomas S. Moorman, Appendix 37; Affidavit of Rear Admiral James Calvert, Appendix 33.

12 Air Force Cadet Regulation, attachment C to Plaintiffs' Motion for Temporary Restraining Order, Appendix 19; Naval Academy Regulations, Section 1501(d), Appendix 15.

13 Plaintiffs' Exhibit 24, Appendix 142.

14 Plaintiffs' Exhibit 33, Appendix 150.

15 Naval Academy Regulation 1502(1)(a), Appendix 15.

16 Transcript 257, Appendix 109.

17 According to Admiral Moorer, "some of our greatest leaders" have come from the ROTC, where they do not, of course, have the benefit of mandatory chapel. This testimony reflects Admiral Moorer's opinion that only officers who are "religiously-oriented" are capable of such achievement. Transcript 208, Appendix

Why, if the purpose is wholly secular, and the training essential for a good officer, should *anyone* be excused?[18] Why, if the aim is to prepare officers to understand and minister to the men under their command, who are likely to be of a variety of religious backgrounds, is chapel switching not *required,* or at least encouraged? Why is it, if the purpose of mandatory chapel is not to instill biblical faith, that an atheist cannot become an outstanding officer?[19] Why, if the chapel regulations seek merely to compel attendance and not participation in worship on Sundays, are midshipmen required to offer prayers in the dining hall immediately before breakfast each morning?[20] How could the alleged secular purpose be achieved if everyone did no more than is required – i.e., attended and watched each other? It is presumably essential to the accomplishment of the alleged purpose that at least *some* cadets pray.

The Government's alleged objective of training cadets to understand and minister to the religious needs of their men in times of stress breaks down into two components: teaching future officers about religion, and learning how to conduct an ecumenical prayer service if the need arises; and enabling future officers to understand the traumatic emotional reactions and mental processes of a soldier under the stress of combat. The first objective is certainly equally, if not far more efficiently achieved in a classroom context; the

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18 In *Vaughn v. Reed,* 313 F.Supp. 431 (W.D.Va. 1970) an excusal provision for students in a public school class in religion was held to "indicate that a constitutionally questionable course is being taught . . . if the course is being properly taught within the constitutional limits, there is no reason for non-attendance by any student." *Ibid,* at 434. Would the academies consider excusing any cadets from such presumably important courses as mathematics or military history?

19 Testimony of Admiral Moorer, Transcript 208, Appendix 101.

20 Naval Academy Regulation 1501(d), Appendix 15. The problem with the Government's attempt to distinguish attendance (a physical act) from worship (an act of conscience) is that it proves too much (appellees' brief, page 40). Under the Government's theory, a cadet could be required to perform such physical acts as (1) kneeling when the congregation kneels; (2) bowing his head when the congregation does so; (3) taking communion; and (4) uttering prayers and singing hymns, so long as these requirements were accompanied by a disclaimer of any intent to interfere with the cadet's beliefs.

second is scarcely capable of achievement by repeated attendance at a relatively tranquil chapel service in which half of those attending pay attention "rarely or never."[21]

Taking at face value the Government's current statement of purpose, that purpose is "to facilitate empathy with religious feeling"[22] and to develop a "spiritual reserve" which will enable the officer to serve effectively as the "spiritual counselor" (a kind of chaplain-surrogate) to his men.[23] The aim is to produce the "absolutely mandatory *respect*, understanding *and sympathy for religion* which has historically been bred by chapel attendance."[24] Such a purpose is itself manifestly religious.

The inescapable conclusion from a review of all the pertinent evidence, we submit, is that the alleged secular purpose is contrary to fact, contrary to logic, and contrary to the dictates of the Establishment Clause.

III. THE EFFECT OF THE REGULATIONS

Assuming the applicability of the purpose/primary effect test, we must differ with the Government's contention that effect is determined by purpose. The Government claims that, as a matter of law, the primary effect is secular if the purpose is secular.[25] But equating the realms of purpose and effect in this manner, we submit, makes bad sense and bad law.

In the first place, it is apparent that if purpose were determinative of effect there would be no need to ever inquire into or even mention the latter. If every governmental action having a secular purpose was deemed, *ipso facto*,

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21 Plaintiff's Exhibit 41, Appendix 156.

22 Appellees' brief, page 10.

23 Appellees' brief, page 7(n).

24 Appellees' brief, page 9 (emphasis added).

25 Appellees' brief, page 32.

to have a secular primary effect, the second half of the "purpose/primary effect" test would be rendered meaningless.

The *Schempp* test is plainly two-fold. Each part is independent of, and must be examined separately from, the other. As this Court observed recently in an analogous situation, "It is not only the purpose but also the effect of the creche that must be considered."[26]

The Government claims, and the trial judge uncritically accepted, that the primary effect is nothing more nor less than the achievement of the alleged purpose – i.e., the imbuing of cadets with an understanding of the religious needs and practices of others. The evidence of this effect upon which the Government relies most heavily is the testimony of Admiral Moorer, based upon his alleged personal knowledge of some 25,000 academy graduates that "they all feel that attendance at chapel and . . . the various churches enhanced their capabilities as leaders and added to their capacities as naval officers."[27]

The Government's representation of this testimony of Admiral Moorer, however, is seriously misleading. On cross-examination, the Admiral was obliged to admit that of the 25,000 naval officers with whom he claims to be acquainted, he could name only *four* with whom he has actually discussed the effects of mandatory chapel.[28] The sole evidence supporting the Government's position on primary effect thus consists of the personal opinions of Admiral Calvert, Secretary Kelley, and Admiral Moorer, the latter being based upon conversations with three other officers. By contrast, the evidence put forth by the appellants as to the effects of the chapel requirements upon the religious attitudes of those exposed to the requirement was far more extensive and broadly based. Reverence Glyn Jones, a retired Navy chaplain, described the strong sense of alienation and resentment expressed to him in conversations with several hundred to

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26 *Allen v. Hickel*, ___ U.S.App.D.C. ___, 424 F.2d 944, 949.(1970).

27 Appellees' brief, pages 9, 35(n).

28 Transcript 220-229, Appendix 101 through 106. One of the four (Jimmy Smith) should probably be excluded, since he was then only a potential applicant for the Naval Academy.

a thousand academy graduates over a period of fifteen to twenty years.[29] Other former chaplains expressed similar findings, as did several present and former cadets and midshipmen.[30] The Government asks rhetorically whether the Chairman of the Joint Chiefs of Staff and Assistant Secretary of Defense are not better qualified than a chaplain to pass judgment on matters of military training and national defense.[31] We submit that the appropriate question is a much narrower one: Who is better qualified to evaluate the effects of mandatory chapel on the religious attitudes of individuals? Chaplains and theologians, whose professional lives have been exclusively devoted to working in the field of religion and religious attitudes, or a Pentagon administrator and a military leader, whose activities touch only intermittently and briefly upon the area of religion?

When, to the testimony of the chaplains is added the empirical evidence of Lieutenant Leslie's discussions with eighty to ninety of his contemporaries,[32] the testimony of the several other present and former cadets and midshipmen, and the result of the West Point survey based on questionnaires from 230 respondents, we submit that the trial Court's finding on the question of effect simply cannot be sustained.[33]

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29 Transcript 31-2, Appendix 63.

30 See, e.g., Appellants' brief, pages 26-9. The alienation effect is sharply underscored by the survey findings (Plaintiffs' Exhibit 41, Appendix 156).

31 Appellees' brief, pages 38-9.

32 Transcript 384-5, Appendix 128.

33 The Supreme Court in *Walz* makes clear that in considering the matter of effect, an important criterion is the degree and continuity of "entanglement" with religious organizations. The degree of entanglement here involved is substantial. Protestant chaplains are furnished to the academies by the General Commission on Chaplains of the Armed Forces – an organization composed of thirty-five Protestant denominations, and Catholic and Jewish chaplains are furnished by counterpart organizations of those faiths. The keeping of attendance records of persons attending chapel and church services is itself a substantial "entanglement". In the case of the Air Force Academy it is hard to imagine a greater degree of "entanglement" then restricting cadets to attending only "established and *cooperating* Colorado Springs churches *as approved by the Senior Cadet Chaplain*." U.S. Air Force Academy Reg., 265-1, §3(d)(1), Appendix 21.

IV. ACHIEVING THE SECULAR OBJECTIVES BY NON-RELIGIOUS MEANS

The Government does not dispute the authority cited by appellants for the proposition that whatever the purpose and primary effect of the regulations, compulsory chapel is unconstitutional if the secular objective could be achieved by non-religious means.[34] The Government seeks to satisfy this requirement by contending that "more than a century of training military leaders has established that the best way" of achieving the objective is through mandatory chapel attendance.[35] The clear implication of this statement is that other ways have been tried, and found wanting. The record, however, is devoid of any evidence that any alternatives to mandatory chapel have ever been tried, or even seriously considered.[36] Perhaps the shortest answer to the Government's contention that compulsory chapel attendance is "absolutely mandatory" to adequately train officers is that less than five percent of the commissioned officers – and *none* of the non-commissioned officers, who are much closer to the men in the foxholes – receive any such training. If the Government took its own claim seriously, they would surely provide religious training for all such commissioned and non-commissioned officers.

To further buttress the necessity for mandatory chapel, the Government continues to rely upon the testimony of Secretary Kelley that to eliminate mandatory chapel would jeopardize our national security, so seriously would

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34 Appellants' brief, pages 33-5; Appellees' brief, pages 37-9.

35 Appellees' brief, page 9.

36 "Q: Has any other method been tried as a substitute for compulsory chapel attendance?

"A: . . . In our opinion there is no other way."

Testimony of Admiral Calvert, Transcript 136, Appendix 74.

it "weaken the fiber of officership in the services".[37] It is not uncommon, in recent months, for Pentagon spokesmen to label a suggestion of eliminating any military program as a threat to national security.[38] It is difficult to take that threat seriously in this instance. Suffice it to say that there is something drastically wrong with our officer training programs, if permitting the three to five percent of our military officers who come from the academies to go to church voluntarily will endanger the national security.[39]

Secretary Kelley's statement is apparently an attempt to comply with the constitutional requirement of "grave and immediate danger to interests which the State may lawfully protect" before First Amendment rights may be restricted.[40] Even where the military establishment is concerned, the Bill of Rights may not be suspended except for "a most extraordinary showing of military necessity in defense of the nation."[41] We submit that the Government's evidence falls far short of this standard.

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37 Appellees' brief, pages 11, 38.

38 The proposal to drop mandatory chapel thus finds itself in the company of recent proposals to limit anti-ballistic missile placement, to curtail MIRV, and to withdraw our forces from Southeast Asia, etc.

39 It hardly seems necessary to belabor the point, but we note in passing that in view of frequent Pentagon warnings about the "Soviet military threat" it does not appear that the Soviet national security has been appreciably weakened by the presumed absence of religious training in Soviet military academies.

40 *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 639.

41 Former Chief Justice Warren, "The Bill of Rights and the Military", 37 NYU Law Review, 181, 197 (1962).

V. THE MILITARY CONTEXT OF THE REGULATIONS

Both the Government's brief, and the trial judge's opinion, rest heavily on those cases expressing reluctance on the part of the courts to interfere in military matters.[42] The gist of the Government's argument is that there is a "special need to defer to military expertise" insofar as military training methods are concerned.[43] The suggestion that civilians should "stick to their knitting" and leave "military matters to the military" is certainly not without precedent, and in many areas of technological and tactical expertise makes eminently good sense.

The trouble with this argument here, as in positions taken by the Government on other points in this case, is that it proves too much. If the Government can require academy officers to attend chapel, then, by the same token, they can require all officers – and, indeed, all military personnel – to do the same. If they can require chapel attendace at all, then surely they may determine which chapel a man will attend. Since most of the military personnel that the cadets will command come from Christian backgrounds, could the academies not compel all officers to attend the Protestant or Catholic chapel? If the goal is to train future officers to lead prayer services in time of need, would the academy training not be even more effective if cadets were required to not only attend but to practice leading the chapel services, with such participation to include the composition and recitation of prayers?[44]

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[42] These cases, and the limitations they impose on curtailing First Amendment rights, even in the military, are discussed in the *amicus* brief of the American Jewish Congress, pages 4-8, and in the comment from the NYU Law Review addendum, pages 1287-90, and we invite the Court's attention to these sources.

[43] Appellees' brief, page 20.

[44] The basic premise of the Government's case is that the cadet may be called upon to exemporize a worship service for his men in some isolated trench or submarine. Presumably, it is his duty in such circumstances not merely to "attend", but to participate in and lead the service. If he can be required to lead worship in such a situation, then why not in chapel at the academy?

As abhorrent as these examples may seem to anyone who takes the First Amendment seriously, they are but the logical extension of the Government's position.

VI. THE LEGAL EFFECT OF VOLUNTARY ENROLLMENT AT THE ACADEMIES

The Government has urged upon the Court as a defense to this action that the plaintiffs may not be heard to complain of any infringement of their constitutional rights under the Religion Clauses since they have voluntarily chosen to enroll in the Military Academies, knowing in advance that they would be required to attend chapel or church services.[45] This argument relies on the 1934 Supreme Court decision in *Hamilton v. Board of Regents,* 293 U.S. 245 (1934), in which it was held that voluntary attendance at the University of California was a "privilege" rather than a "right", and that students at the University could therefore not complain of a state law requiring ROTC training which they found repugnant to their religious convictions.

Whatever comfort the *Hamilton* case may have given defendants in 1934, that case has been so thoroughly eroded by subsequent decisions – to the point of being all but overruled – that it cannot be considered to be of any authority today.

Although *Hamilton* has itself not yet been directly overruled, the cases upon which the Court in *Hamilton* relied, *U.S. v. Schwimmer,* 279 U.S. 644 and *U.S. v. McIntosh,* 283 U.S. 605, have been squarely overruled by *Girouard v. U.S.,* 328 U.S. 61 (1945), holding that an alien who, because of religious scruples, is unwilling to bear arms in defense of this country, may nevertheless be admitted to citizenship.

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[45] Appellees' brief, p. 25, 39.

The erosion of the *Hamilton* doctrine got well underway in *United Public Workers v. Mitchell,* 330 U.S. 75 (1946), in which the Hatch Act was upheld. In the course of that Opinion, Justice Reed declared that federal employees are protected by the Bill of Rights, and that *Congress may not "enact a regulation providing that* no republican, Jew or Negro shall be appointed to federal office, or that *no federal employee shall attend mass* or take any part in missionary work." (emphasis added) *Ibid,* at 100.

In *Wieman v. Updegraff,* 344 U.S. 183 (1952), the *United Public Workers* doctrine was expanded in a holding that Oklahoma teachers may not be required to take a loyalty oath. "We need not pause to consider whether an abstract right to public employment exists." *Ibid,* at 192.

In *Torcaso v. Watkins,* 367 U.S. 488 (1960), the State of Maryland argued, as does the Government here, that becoming a Notary Public was a wholly voluntary act, but the Supreme Court nevertheless struck down a state law requiring public officers to declare their belief in the existence of God. In so doing, the Court, in a unanimous opinion, held that: "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state imposed criteria forbidden by the Constitution." *Ibid,* at 495-6.

In *Dixon v. Alabama State Board of Education,* 294 F.2d 150, *cert. denied,* 368 U.S. 930 (1961), the Court of Appeals for the Fifth Circuit held that students at Alabama State College could not be dismissed without the due process requirements of notice and hearing. In rejecting the State's argument that attendance at the University was voluntary and a "privilege", the Court severely further discredited the *Hamilton* doctrine in declaring that, "The State cannot condition the granting of even a privilege upon the renunciation of the constitutional right of procedural due process." (citations omitted) *Ibid,* at 156.

By 1962, the *Hamilton* holding had been so thoroughly discredited that Justice Brennan, concurring in *Schempp*, cast doubt upon whether *Hamilton*, "retains any vitality with respect to higher education." *Schempp*, 374 U.S. at 251. In the same year, the Court in *Sherbert v. Verner, supra*, struck down a South Carolina law denying unemployment benefits to a Seventh Day Adventist who refused to work on Saturday.

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (citations omitted) *Sherbert v. Verner, supra*, 374 U.S. at 404.

In *Soglin v. Kauffman*, 295 F.Supp. 978 (1968), the Court pointed out that, although *Hamilton* "has not been expressly overruled," its "present vitality" has been "sharply questioned." *Ibid*, at 988-90.

Finally, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1968), the most recent Supreme Court case citing *Hamilton*, the Court, in a footnote reference, virtually relegated *Hamilton* to the dustbin of judicial history, and clearly indicated that it is not longer of any relevance.

> "*Hamilton v. Regents of Univ. of California*, 293 U.S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a State university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military 'science' could not conflict with his constitutionally protected freedom of conscience. *The decision cannot*

> *be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental guarantees.* See, *e.g., West Virginia v. Barnette,* 319 U.S. 624 (1943); *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (C.A. 5th Cir. 1961); *Knight v. State Board of Education,* 200 F.Supp. 174 (D.C. M.D. Tenn. 1961); *Dickey v. Alabama State Board of Education,* 273 F.Supp. 613 (D.C.M.D. Ala. 1967). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Note, Academic Freedom, 81 Harv. L. Rev. 1945 (1968)." (emphasis added) 393 U.S. at 506.

Accordingly, Appellants say that the fact that they came voluntarily to the Academies, whether or not Academy enrollment be deemed a "privilege", constitutes no defense whatever to the denial of their First Amendment rights.

Respectfully submitted,

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ADDENDUM

Comment, 45 N.Y.U. Law Review 1286-1302 (December 1970)

CONSTITUTIONAL LAW — ESTABLISHMENT CLAUSE — REQUIREMENT OF CHURCH ATTENDANCE AT MILITARY ACADEMIES HELD VALID—*Anderson v. Laird**

First amendment challenges to military actions, once rare, have become increasingly common.[1] When such suits are brought, difficult legal questions arise because they represent the conflict of two paramount social interests—constitutional government and national security. Along with the problems always inherent in constitutional interpretation, such challenges also involve the difficult question of determining the limits of civilian review of military action. Because of the important issues raised, all cases in this area warrant serious consideration for an understanding of how best to balance the interests involved. *Anderson v. Laird*,[2] apparently the first case challenging military action under the establishment and free exercise clauses,[3] is thus instructive, although its conclusion is questionable.

Regulations[4] currently in force at the United States Military, Naval and Air Force Academies require all cadets and midshipmen[5] to attend religious services every Sunday. Violations are punished in the same manner as violations of other regulations: by reprimands, demerits, marching tours, confinement to quarters and, for repeated violations, expulsion.[6] Cadets may choose to attend a Protestant, Catholic or Jewish service,[7] but may change denominations only with the approval of the respective chaplains involved, and on demonstration of a sincere desire to affiliate with a new church. On their face, the regulations make attendance mandatory for all cadets. It is, however, the stated policy of the Academies to excuse a cadet whose sincerely held convictions conflict with the requirements.[8]

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* No. 169-70 (D.D.C., July 31, 1970), No. 24,617 (D.C. Cir., filed Aug. 7, 1970).

1 See, e.g., Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969); Callison v. United States, 413 F.2d 133 (9th Cir. 1969); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

2 No. 169-70 (D.D.C., July 31, 1970), No. 24,617 (D.C. Cir., filed Aug. 7, 1970) [hereinafter *Anderson*].

3 The plaintiffs also claimed that the regulations violated the religious test clause of article VI. See text accompanying note 11 infra.

4 U.S. Military Academy Reg., ch. 5, § IV, ¶ 819; U.S. Air Force Academy Reg. 265-1; U.S. Naval Academy Reg., pt. II, ch. 15.

5 For the balance of this comment the term "cadets" will include both the cadets at the Military and Air Force Academies and the midshipmen at the Naval Academy.

6 *Anderson* at 4.

7 There is also a provision for substituted attendance at services at approved churches in nearby towns, except at West Point where such services are not within reasonable proximity to the Academy. U.S. Air Force Academy Reg. 265-1, 3(d)(1); U.S. Naval Academy Reg. 1502(1)(d).

8 The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, Apr. 18, 1969. The statement says that "it is understood that intelligent provisions must be made for bona fide cases where

Plaintiffs, two cadets at the United States Military Academy, and nine midshipmen at the United States Naval Academy, brought a class action on behalf of all cadets at the Military, Naval and Air Force Academies.[9] The defendants were the Secretary of Defense and the Secretaries of the Army, Air Force and Navy. The plaintiffs claimed that the regulations violated the establishment and free exercise clauses of the first amendment[10] and constituted a religious test for public office prohibited by article VI of the Constitution.[11] A declaratory judgment that compulsory church or chapel attendance violated these constitutional provisions was sought, as well as a permanent injunction forbidding the Academies from enforcing the regulations.[12] The court decided the case on the merits after ruling that the defense of plaintiffs' failure to exhaust administrative remedies was not available, since no such remedies existed.[13] The constitutionality of the regulations was upheld, and the court denied the relief sought.[14]

The problem in this case, as in all first amendment cases, is that of striking a balance between the needs of society and the rights of the individual. The fact that in *Anderson* "society" is represented by the military renders the case more difficult. Courts have traditionally been more reluctant to curtail military interference with the individual rights of servicemen than other forms of government encroachment; *Anderson* falls squarely within this tradition. Relying on a long line of cases,[15] the court reiterated the often cited reasons for judicial restraint in this area: the unique role of the military in society in preparing for and waging

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attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen." Id. at 32.

[9] Cf. Fed. R. Civ. P. 23. None of the named plaintiffs was a cadet at the Air Force Academy. However, the similarities between the cadet positions at the three Academies and the three regulations were considered sufficient to bring the Air Force Academy into the suit. *Anderson* at 2 n.3.

[10] U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[11] U.S. Const. art. VI, cl. 3: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[12] The plaintiffs also sought a permanent injunction forbidding the Academies from disciplining them for their involvement in the suit. This relief was granted. *Anderson* at 25.

[13] Id. at 3.

[14] Id. at 18. But see note 12 supra.

[15] Id. The cases cited were: Orloff v. Willoughby, 345 U.S. 83 (1953); Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), petition for cert. dismissed, 396 U.S. 976 (1969); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969); Fox v. Brown, 402 F.2d 837 (2d Cir. 1968), cert. denied, 394 U.S. 935 (1969); Watson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Noyd v. McNamara, 378 F.2d (10th Cir.), cert. denied, 389 U.S. 1022 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969); Arnheiter v. Ignatius, 292 F. Supp. 911 (N.D. Calif. 1968); Rank v. Gleszer, 288 F. Supp. 174 (D. Colo. 1968).

A-3

war; the importance of that role to national security; the peculiar nature of military life as a result of the function of the military; and the consequent incompetence of civilians to make judgments regarding military training and discipline.

The court's reluctance to interfere with what it viewed as a military matter was reinforced by the fact that the regulations in question dated back approximately 150 years. This fact alone seemed to create a presumption of validity in the eyes of the court.[16]

On the other hand, the court recognized that individuals do not completely relinquish their constitutional rights upon entering the military. In fact, "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[17] Thus, the military, like all branches of government, is bound to respect the religion clauses of the first amendment. However, first amendment rights are subject to certain limitations. The religion clauses, though phrased as absolutes, cannot be so in reality, since some degree of government involvement with religion is inevitable. The function of the court in deciding a religion question is to determine whether the extent of government interference is excessive in the light of the long judicial history of first amendment interpretation.[18]

To determine whether the defendants' actions exceeded constitutional limits, the *Anderson* court relied heavily on the purpose-primary effect test announced by the Supreme Court in *School District of Abington Township v. Schempp*.[19] The *Anderson* court accepted the testimony presented by the defendants that the purpose of the regulations was the complete formation of military officers, and not religious training.[20] Their testimony was to the effect that to command effectively officers must understand the forces that motivate their men, and that one such force is religion. Hence, training at the Academies must provide the cadets with an insight into religion and its effects on believers. The court concluded that attending services and seeing religion in action was the best and most efficient way for cadets to acquire the training necessary to enable them to be sensitive to the spiritual needs of their troops.[21] Thus, the court found that the training of the complete officer was a valid secular purpose, and that the means employed were suitable to achieving the desired end. Logically, the court concluded that the primary effect of the regulations was secular because they sought to

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[16] See *Anderson* at 11.

[17] Id. at 9-10, quoting United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). Accord, United States v. Voorhees, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954).

[18] Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

[19] 374 U.S. 203 (1963). "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 222, quoted in *Anderson* at 13. This test was also applied in Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

[20] *Anderson* at 17.

[21] Id. at 14-15.

21-70

A-4

implement a valid secular purpose. The court went on to hold that the regulations neither advanced nor inhibited religion because they left each cadet free to attend the service of his choice and free to worship or merely to observe. It concluded that each cadet could, without interference, practice his own religion or practice none, and that the regulations did not violate the free exercise clause of the first amendment.[22]

The court further determined that the plaintiffs' contention that the requirement of church attendance constituted a religious test in violation of article VI of the Constitution was without merit. Since there was no case law directly in point, the court rested its decision on an interpretation of the meaning of article VI in the light of its historical context. After reviewing the historical background of the clause's adoption,[23] the court concluded that the purpose of banning the religious test oath was to prevent the Federal Government from creating an established religion. Since the court had already decided that there was no violation of the establishment clause, it followed that there was also no violation of the religious test clause.[24] The court further stated that since less than 5 per cent of the officer corps are graduates of the Academies, the church attendance requirement cannot be considered a religious test for becoming an officer.[25]

The religion clauses, like all first amendment provisions, require the balancing of diverse interests in their application and it is often difficult to draw clear distinctions between what is constitutional and unconstitutional in this area. Unfortunately, the *Anderson* court's interpretation of these difficult legal issues appears to have been further complicated by an unnecessary deference toward military determinations. Although there is a clear tradition of judicial restraint in matters of peculiar military competence, courts have not given the military *carte blanche* to do as it pleases without regard to individual rights. While it is true that civilian courts will not review purely discretionary military judgments as, for example, disciplinary proceedings not involving constitutionally protected activities,[26] or duty assignments and promotions,[27] they have refused to allow the military to extend this category to the point of excluding civilian review of all cases involving

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[22] Id. at 20.

[23] Id. at 23-24.

[24] Id. at 24.

[25] Id. at 25.

[26] See, e.g., Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), petition for cert. dismissed, 396 U.S. 976 (1969); Fox v. Brown, 402 F.2d 837 (2d Cir. 1968), cert. denied, 394 U.S. 938 (1969); Winters v. United States, 281 F. Supp. 289 (E.D.N.Y.), aff'd mem., 390 F.2d 879 (2d Cir.), cert. denied, 393 U.S. 896 (1968). But see Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970), where the court reviewed the decision, but found it to be reasonable.

[27] See, e.g., Orloff v. Willoughby, 345 U.S. 83 (1953); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969); Noyd v. McNamara, 378 F.2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967); Arnheiter v. Ignatius, 292 F. Supp. 911 (N.D. Cal. 1968).

21-70

military personnel. Civilian courts have reviewed the military's dealings with its own personnel to the extent necessary to protect the constitutional rights of the members of the Armed Forces.[28] In particular, the allegation of a first amendment violation by the military seems to warrant a full civilian review.[29] Since the first amendment rights of the plaintiffs were clearly in question, the *Anderson* court had plenary jurisdiction over the suit. The court exercised its jurisdiction by hearing and deciding the case on the merits. However, the court's reliance on cases limiting the jurisdiction of civilian courts in matters of peculiar military competence[30] and its treatment of the facts in this case[31] indicate that the court may have unnecessarily restricted the scope of its review.

It is now appropriate to turn to a consideration of the plaintiffs' rights under the religion clauses of the first amendment. At the outset, it should be noted that while it is a truism that first amendment rights are not absolute,[32] still "[t]hey are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[33] Moreover, the religion clauses of the first amend-

[28] Most commonly, civilian courts have enforced the due process clause of the fifth amendment against the military. They have required the military to abide by its own valid regulations: Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); United States ex rel. Mankiewicz v. Ray, 399 F.2d 900 (2d Cir. 1968); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Coleman v. Brucker, 257 F.2d 661 (D.C. Cir. 1958); Hamlin v. United States, 391 F.2d 941 (Ct. Cl. 1968). They have also insured that courts-martial conduct themselves in a manner conducive to fairness towards defendants. Burns v. Wilson, 346 U.S. 137 (1953).

[29] See Callison v. United States, 413 F.2d 133 (9th Cir. 1969), vacated and remanded sub nom. Morico v. United States, 399 U.S. 526 (1970), for reconsideration in the light of Welsh v. United States, 398 U.S. 333 (1970). The court of appeals gave Callison a full hearing on his alleged deprivation of first amendment rights, but decided the merits against him.

[30] *Anderson* at 7; see cases cited in note 15 supra.

[31] *Anderson* at 17-18.

[32] In the military, as elsewhere, first amendment rights are limited by reasonable restriction as to time, place and circumstances. The circumstances will necessarily include the military's special role and peculiar needs. Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). See Callison v. United States, 413 F.2d 133 (9th Cir. 1969), vacated and remanded sub nom. Morico v. United States, 399 U.S. 526 (1970), for reconsideration in the light of Welsh v. United States, 398 U.S. 333 (1970). Interestingly, the court in *Goldwasser* applied the standard of Pickering v. Board of Educ., 391 U.S. 563 (1968), to military employees without differentiation on the basis of their association with the military. 417 F.2d at 1176. The test in *Pickering* is that, unless knowingly or recklessly false, a teacher's out of class statements on public issues may not be considered a basis for dismissal. 391 U.S. at 574. Within the military context, further special circumstances may arise. Thus military jurisdiction may validly be expanded in time of war, especially if the proceeding takes place in a remote military outpost or if the civilian courts are not open. O'Callahan v. Parker, 395 U.S. 258, 273 (1969). None of the circumstances apply to *Anderson*.

[33] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). The standard is no different when the military is involved. Former Chief Justice Warren commented that

21 - 7

ment are to be given an exceptionally broad interpretation.[34] In the jargon of the cases, "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "[35]

Although both the theory and the application of the religion clauses have often troubled the courts which have had to interpret them,[36] some questions in this area are settled beyond dispute. Perhaps the most consistent position which the Supreme Court has taken is that neither the state nor Federal Government may oblige an individual to attend church services or punish him for failure to attend. In the often repeated words of *Everson v. Board of Education:* [37]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . *Neither can force nor influence a person to go to or remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance.*[38]

One of the goals which led to the adoption of the establishment clause was the elimination of obligatory church attendance,[39] and American courts have never lost sight of that objective in the subsequent centuries of interpretation.[40] The prohibitions in *Everson* constitute the minimum requirements of the establishment clause. *Everson* drew a sharp distinction between actions which are clearly proscribed and those which are, or may be, permissible; between black, white and grey areas of constitutional interpretation. Later Supreme Court decisions, notably

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> [o]n the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution.

Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 197 (1962).

[34] McGowan v. Maryland, 366 U.S. 420, 441-42 (1961).

[35] Everson v. Board of Educ., 330 U.S. 1, 16 (1947). Accord, McGowan v. Maryland, 366 U.S. 420, 433 (1961); Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948).

[36] Courts still debate whether or not the religion clauses were intended as absolutes. Compare Zorach v. Clauson, 343 U.S. 306, 312 (1952) with Walz v. Tax Comm'n, 397 U.S. 664, 668-89 (1970). For one of many examples of the difficulties of applying the establishment clause to different fact patterns, compare Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) with Zorach v. Clauson, 343 U.S. 306 (1952).

[37] 330 U.S. 1 (1947).

[38] Id. at 15-16 (emphasis added). On this position, the majority and the minority agreed. Id. at 59-60. The Court has specifically reaffirmed this stand on many occasions. See, e.g., Board of Educ. v. Allen, 392 U.S. 236, 242 (1968); Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); Zorach v. Clauson, 343 U.S. 306, 314-15 (1952); Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948).

[39] Everson v. Board of Educ., 330 U.S. 1, 13 (1947).

[40] See note 38 supra.

School District of Abington Township *v. Schempp*,[41] have provided standards for dealing in the grey area. The *Schempp* test, however, does not render equivocal the clear prohibitions of *Everson*; *Schempp* supplements, but does not supersede, *Everson*.[42] The regulations involved in this suit probably "force" and undoubtedly "influence" cadets to attend church against their will.[43] They constitute a type of action which the Constitution prohibits. No balancing test need be applied to determine their constitutional infirmity because *Everson* places them beyond the pale of permissible governmental action no matter what circumstances may seem to call for them.

The *Anderson* court agreed that to oblige a person to worship against his will violates the establishment clause.[44] The court argued, however, that since the regulations only require attendance, leaving each cadet free to worship or not as he pleases, they are not constitutionally prohibited.[45] The Supreme Court in *Everson* made no such distinction. It clearly stated that "[n]o person can be punished . . . for church *attendance* or *non-attendance*."[46] Nor can the distinction be maintained without disregarding legal precedent and undermining the clause's effectiveness.[47] Thus, it seems that the regulations are prohibited by the establishment clause as interpreted by *Everson*, and that it was unnecessary for the court to apply the *Schempp* test to determine whether or not they were unconstitutional.

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41 374 U.S. 203 (1963).

42 The *Schempp* Court reviewed the interpretation of the religion clauses and cited *Everson* and *McGowan* in support of its test, rather than proposing it as a break with tradition. Id. at 222.

43 Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

44 *Anderson* at 18.

45 Id. at 13-14, 18.

46 330 U.S. at 15-16 (emphasis added).

47 Freedom of belief is clearly absolute. Sherbert v. Verner, 374 U.S. 398, 402 (1963); Braunfeld v. Brown, 366 U.S. 599, 603 (1961); United States v. Ballard, 322 U.S. 78, 86 (1944); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). However, freedom of action under the religion clauses is subject to the same restrictions as other first amendment rights. Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Here the balancing test applies and "[c]onduct remains subject to regulation for the protection of society." 310 U.S. at 304. While the balancing test applies to nonaction, it is difficult, except in rare and extreme cases, to conceive of situations where the needs of society would outweigh an individual's right to refrain from actions which violate his convictions. In *Barnette*, the Court made it very clear that only an overwhelming social need would justify obliging an individual to take action repugnant to his religious convictions. 319 U.S. at 633. Such a need can be found in cases where parents refuse to provide needed medical attention for their children for religious reasons. See, e.g., People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947). But *Everson* has removed church attendance from this balancing process. By establishing a minimum standard, *Everson* insures that a rationale such as that found in *Anderson* will not be used to erode the right not to be religious to the point where there would only remain the freedom not to believe. At that point, the clause would lose all meaning since freedom of belief is beyond the reach of government and needs no protection.

Nevertheless, under a proper interpretation of *Schempp*, the same conclusion will be reached. In *Schempp* the Court stated:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[48]

The court in *Anderson* found that the purpose of the regulations was to produce well-rounded officers by giving the cadets a sensitivity to, and an understanding of, the religious sentiments which they will presumably encounter among their troops. If this were truly the aim of the regulations, they would almost certainly be permissible.[49] To determine the regulations' purpose, the court relied entirely on the testimony of the defendants.[50] The history of the regulations[51] and the actions of the defendants raise serious questions as to the accuracy of the court's determination.

There is little doubt that the regulations were originally intended to further a religious purpose.[52] In *McGowan v. Maryland*[53] the Court held that religious origin did not conclusively prove a religious purpose, but raised a strong presumption to that effect which could be overcome only by a showing that the practice had evolved to the point of losing

[48] 374 U.S. at 222, citing *Everson*.

[49] In Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970), a similar approach was taken. The defendants sought to justify religion courses in public schools on the grounds that their purpose was to teach students about religion rather than to indoctrinate them. The defendants argued that an understanding of western civilization requires some religious background. The court held that religious education for this purpose was permissible under *McCollum* and *Schempp* but noted that strict safeguards must be established to insure genuine secularity of purpose. It requires little imagination to conceive of situations where an understanding of religious motivation might promote better military leadership. In *Vaughn* the goal was the achievement of a well-rounded education by understanding western civilization through religious education. In *Anderson* the goal may be to promote a complete military education through religious training. In both, the stated goal would be permissible. But in both, careful scrutiny of the facts is necessary to insure the genuineness of the stated purpose and the effectiveness of the chosen means. While the *Vaughn* court was aware of this need, in *Anderson* the scrutiny was lacking.

[50] *Anderson* at 17-18.

[51] The discussion of the historical development of the regulations refers to West Point and Annapolis, which established their requirements in 1821 and 1853 respectively. The Air Force Academy adopted a similar requirement upon formation in 1955. Since the Air Force Academy seems to have been merely following the tradition of the other Academies, any conclusion about the others would apply to it as well. Id. at 5.

[52] The defendants conceded this point. Opposition to Motion for Preliminary Injunction for Defendant at 19(n); Memorandum of Law for Plaintiff at 5 [hereinafter *Memorandum*]. The original regulation established for West Point in 1821 provided for dismissal of any cadet who behaved "indecently or irreverently while attending divine service" or who "profane[d] the Sabbath." Id.

[53] 366 U.S. 420 (1961).

21-72

its religious character.[54] While such an evolution was clearly demonstrated in *McGowan*, it is far from apparent in *Anderson*. As recently as 1968, an official statement of policy gave as a reason for required church attendance "the fact that Biblical faith is the foundation stone of honor and integrity."[55] Further, the catalogues of the Academies hardly suggest a secular purpose. West Point's catalogue states that "[a]ll cadets are provided a sound basic religious atmosphere," while Annapolis' catalogue reads as follows: "Because we are 'one nation under God,' it is most appropriate that the Midshipmen who will someday become the leaders of our Navy should regularly attend divine worship services."[56] Finally, the regulations on their face reveal a religious purpose. For example, the Air Force regulation says that its purpose is "to make it possible for a Cadet to develop his religious experience in the church in which he was reared and to permit the Cadet to understand the religious responsibilities held by an Air Force officer in the assumption of leadership of those under his command."[57] The regulation goes on to say that "Cadets are encouraged to participate in related religious services and activities to further their training in the faith of their choice."[58] It is impossible to reconcile such language with genuine secularity of purpose.

Moreover, the defendants' actions clearly reveal the religious character of the regulations. All three Academies restrict the freedom of the cadet to transfer from one denomination to another.[59] The *Anderson* court found that in order to change denominations "the cadet must demonstrate a sincere desire to affiliate with the new church."[60] Further, the superintendents of the Academies envisaged excusing cadets from church attendance "where attendance would be in conflict with sincerely held convictions."[61] If the purpose of the regulations is truly to give the cadets an understanding of the function of religion, there seems to be no reason why a cadet must remain with one denomination for the entire training period unless he can show a "sincere desire" to affiliate with a different church. Rather, it would seem that

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[54] Id. at 431.

[55] *Memorandum* at 5.

[56] Id. at 6.

[57] U.S. Air Force Academy Reg. 265-1.

[58] Id. Reg. 261-1~~(a)(b)~~. Similar language appears in U.S. Navy Reg., Art. 0711, which says, in part, that "[t]he religious tendencies of individuals shall be recognized and encouraged." Admiral Moorer, chairman of the Joint Chiefs of Staff, admitted on cross-examination that the regulations of the Naval Academy were designed to carry out the mandate of art. 0711. *Memorandum* at 8.

[59] At the Military and Air Force Academies the approval of the "sending Chaplain," the "receiving Chaplain" and the cadet's parents is required before a cadet can change from one denomination to another. U.S. Military Academy Reg. 323; U.S. Air Force Academy Reg. 265-1~~, § 3-4(b)(9)~~. At the Naval Academy, the senior chaplain must approve. U.S. Naval Academy Reg., § 1502(1)(a).

[60] *Anderson* at 5.

[61] The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, Apr. 18, 1969, at 32. See note 8 supra.

21 - 73

the cadet should be required to rotate among the churches to get a more varied view of religion and religious motivation.[62] Furthermore, if the religious program at the Academies is genuinely secular and performs an essential educational function, no cadet should be excused from attendance.[63] Moreover, if this type of training is indeed necessary, it is incomprehensible that the military requires it solely of the 5 per cent of its officers who graduate from the Academies.

Even if the purpose is proper, however, the regulations may nevertheless be unconstitutional. The *Schempp* test requires not only a secular purpose, but also "a primary effect that neither advances nor inhibits religion."[64] The *Anderson* court determined that the primary effect of the regulations was secular, and thus not prohibited by the Constitution. Giving great weight to the testimony of military experts,[65] the court determined that the primary effect was the accomplishment of the desired purpose: the development of an understanding of religion.[66] If, at the same time, church attendance encouraged genuine religious belief to the clear advancement of religion, the court concluded that this advancement was incidental only and thus insufficient to be considered a violation of the religion clauses.[67]

The basis for this finding is tenuous at best. It would appear that the regulations in some ways advance, and in other ways inhibit, religion. The regulations advance religion almost by definition; church attendance is one of the foremost goals of organized religion. That many, if not most, cadets would not attend if attendance were not mandatory is evident from the testimony.[68] Furthermore, the requirements certainly encourage the religious tendencies of cadets with a religious upbringing. In fact the Air Force regulation states that "[t]he Academy's religious program . . . provides a cadet opportunities for growth in the faith in which he was reared."[69] The *Anderson* court admitted that "it is undeniable . . . that the mandatory attendance will have some religious effect on some of the cadets."[70] This admission could hardly be avoided in view of the defendants' claim that the policy in most cases served to strengthen the cadets' religious tendencies.[71]

[62] That rotation is not only discouraged, but is in fact impossible under the present system is clear from the testimony of Assistant Secretary of Defense Kelly who stated that if a cadet wanted to change denominations for a single time, out of curiosity, he would not be allowed to do so. *Memorandum* at 32-33.

[63] In Vaughn v. Reed, 313 F. Supp. 341 (W.D. Va. 1970), the court stated that the fact that some students were excused for religious reasons from a program of religious education shed grave doubts on its secularity and, hence, on its constitutionality.

[64] 374 U.S. at 222.

[65] *Anderson* at 17.

[66] Id.

[67] Id. at 19.

[68] *Memorandum* at 24. Admiral Moorer testified that despite the threat of severe penalties, chapel skipping is a common practice. Id. at 27.

[69] U.S. Air Force Academy Reg. 265-1 ~~§ 1-1(b)~~ b.

[70] *Anderson* at 18.

[71] *Memorandum* at 25.

The regulations also have negative effects on religion. Compulsory attendance almost inevitably breeds hostility to religion on the part of atheists and even mildly religious theists who, regardless of their convictions, are obliged to take part in a ritual which to them has little or no meaning.[72] The impact on believers, though perhaps less direct, is certainly as harmful. Since the modern religions view faith as the expression of a free spirit, a religious man will find the idea of religious service as an obligatory expression of faith a contradiction in terms.[73] Religious services should be an expression of genuine conviction, and this can only be hampered by the presence of silent observers whose attitudes range from bored indifference to active hostility.[74] Thus, in a variety of ways, mandatory church attendance inhibits the practice of religion.

The Supreme Court in *Schempp* made it clear that governmental action which has both a valid secular purpose and a primary effect which neither advances nor inhibits religion may still be unconstitutional if it uses religious means to accomplish its purpose where nonreligious means would suffice. In the words of Justice Brennan, "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."[75] Not only did the Academies fail to provide such a clear demonstration, but it is likely that classes, lectures or films, combined perhaps with attendance at two or three representative services, would educate the cadets better than required church attendance.[76] At the very least, these methods would not arouse the hostilities which services unavoidably create because of their strong emotional impact and their essentially religious nature. Admiral Calvert, Superintendent of the Naval Academy, in fact conceded that a course in comparative religion might be more effective than the present requirements.[77] It further appears from his testimony that alternatives have not only never been tried, but have not even

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[72] Id. at 21-25.

[73] Id. at 18. Cf. M. Konvitz, Expanding Liberties 28-30 (1967).

[74] In the words of one witness:

> Worship is not a spectator sport. . . . Great care is taken . . . not to refer to the participating body, the worshipping body, as an audience. It is a congregation and the assumption is that every person present is participating.
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> . . . .
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> I can think of nothing more deleterious . . . to those seeking to worship than the presence of an apathetic observing group who, though they may sit and stand, do not repeat the prayers or sing the hymns. That would have a chilling effect, I should think, upon the effort of worship of the worshipping congregation.

Memorandum at 19 (testimony of Rev. Dean Kelly of the Nat'l Council of Churches).

[75] 374 U.S. at 265 (Brennan, J., concurring). Accord, Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (Brennan, J., concurring).

[76] See the testimony of religious experts in *Memorandum* at 28-29.

[77] Id. at 29.

received serious consideration.[78] Thus, the defendants' contention that no other means would serve as well is difficult to justify.

The regulations may violate the establishment clause in yet another way. Recent cases[79] have held that government action which *appears* to advance or inhibit religion is unconstitutional even if it would otherwise satisfy the purpose-primary effect test. *Allen v. Hickel*[80] concerned the erection of a nativity scene in a public park for the stated purpose of showing the different ways in which Americans celebrate Christmas. The Court of Appeals for the District of Columbia stated:

> The danger to be apprehended is that *it will appear to the public* . . . that the Government has given a stamp of approval to the religious content of the Nativity scene, and that this effect will not be limited by the secular purpose stated in the pamphlets which are available to a smaller group and examined by a group still smaller.[81]

Lowe v. City of Eugene[82] challenged the erection of a large cross on public property. Holding the erection unconstitutional, the court said: "*Whether so intended* by the city council *or not*, the city's participation in the display has placed the city officially and *visibly* on record in support of those who sought government sponsorship for their religious display."[83] *Allen* concerned a temporary, but nationally publicized, use of public property for religious display. In *Lowe* the structure was permanent and highly visible, but its impact was limited to residents and visitors of the city of Eugene. Both situations created the danger of an appearance of government encouragement of religion. This appearance, it was feared, would be unmitigated by the existence of a secular purpose which, though possibly valid, would be unknown to the general public. The same circumstances exist in *Anderson*. *Anderson* concerns the continuous use, on a permanent basis, of public property for religious display. Nor is this display hidden from public view, since the Academies are military showcases, as well as training grounds, and as such are often in the public eye. The sight of ranks of cadets in dress uniform marching to chapel cannot but give an impression of government sponsorship of religion to a visitor of the Academies.[84] This would be so regardless of whether the visitor was

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[78] Id. at 35-36.

[79] Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970); Lowe v. City of Eugene, 459 P.2d 222 (Ore. 1969), appeal dismissed sub nom. Eugene Sand & Gravel, Inc. v. Lowe, 397 U.S. 591 (1970).

[80] 424 F.2d 944 (D.C. Cir. 1970).

[81] Id. at 949 (emphasis added).

[82] 459 P.2d 222 (Ore. 1969), appeal dismissed sub nom. Eugene Sand & Gravel, Inc. v. Lowe, 397 U.S. 591 (1970).

[83] Lowe v. City of Eugene, 451 P.2d 117, 124 (Ore.) (Goodwin, J., dissenting) (emphasis added), opinion withdrawn, 459 P.2d 222 (Ore. 1969), appeal dismissed sub nom. Eugene Sand & Gravel, Inc. v. Lowe, 397 U.S. 591 (1970). This opinion was the basis for the decision on rehearing which reversed the previous decision. 459 P.2d at 224.

[84] The possibility that this appearance of government encouragement of religion was created by design rather than by accident should at least be considered.

21 - 74

aware of the regulations' existence, but the danger would certainly be increased by such knowledge. Only if the public were generally aware of the stated secular purpose of the regulations would the requirements of *Allen* and *Lowe* be satisfied.

The mere semblance of government encouragement or favoritism may place pressure on religious minorities to conform to a more prevalent view, and such pressure tends toward an establishment of religion in violation of the Constitution.[85] Where government entanglement with religion does not reach the point of actual pressure, but merely of "offense to the sensibilities of citizens who are offended either because they are of different religions (or none), or because they are devoutly Christian and believe that the presentation of profoundly spiritual matter in a light-hearted manner and on Government property amounts to 'profanation' that renders unto Caesar some of what is the Lord's"[86] then, as the *Allen* court implies, this is sufficient to render a governmental practice unconstitutional. So, in *Anderson*, the holding of religious services as part of a government program of education may well appear to believers to make a mockery of religion, while offending nonbelievers as government sponsorship of religion. Therefore, the holdings in *Allen* and *Lowe* clearly apply to, and should control, the decision in *Anderson*.

Finally, the regulations violate the most recent establishment clause standard stated by the Supreme Court in *Walz v. Tax Commission*.[87] The *Walz* test differs from the *Everson* and *Schempp* standards. *Walz* clearly repudiates *Everson*'s "no aid" approach.[88] However, the *Walz* court recognized the necessity for a minimum standard of permissible governmental action, the same need to which *Everson* addressed itself. In the words of Chief Justice Burger:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. *Short of those expressly proscribed governmental acts* there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[89]

Thus, *Walz* does not affect those parts of *Everson* which are relevant to *Anderson*.

Lieutenant Robert Leslie stated that "they [the cadets] thought that the chapel was a farce, that it was just another ceremony. You wore your full dress uniform to parade on Saturday for the people. You wore your full dress uniform to march up to chapel on Sunday, and if you didn't wear that uniform, you were hidden way up in the balcony." *Memorandum* at 23-24, 26. See id. at 26 n.1.

[85] See Engel v. Vitale, 370 U.S. 421, 431 (1962).

[86] Allen v. Hickel, 424 F.2d 944, 949 (D.C. Cir. 1970).

[87] 397 U.S. 664 (1970).

[88] Id. at 670; The Supreme Court, 1969 Term, 84 Harv. L. Rev. 127, 127-28 (1970); Note, Tax Exemptions, Subsidies and Religious Freedoms After *Walz v. Tax Commission*, 45 N.Y.U.L. Rev. 876, 888-89 (1970).

[89] 397 U.S. at 669 (emphasis added).

Walz's treatment of *Schempp* is somewhat more ambiguous. The Court paid lip service to the purpose-primary effect test when it said: "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are *intended* to establish or interfere with religious beliefs and practices or have the *effect* of doing so."[90] However, what remains of the test is drastically modified by *Walz*. *Walz* retains *Schempp*'s inquiry into legislative purpose, but instead of looking for "advancement or inhibition,"[91] *Walz* prohibits "sponsorship" of religion.[92] "Sponsorship" is clearly the easier standard to meet, and as it is applied in *Walz*, few purposes could fail to qualify. The Court's determination that the promotion of religious groups as "beneficial and stabilizing influences in community life"[93] is a valid legislative purpose broadens this part of the *Schempp* test so far that "it can no longer be used effectively to distinguish permissible from impermissible programs."[94]

Walz transforms *Schempp*'s purpose, but it abandons its primary effect test.[95] For the latter it substitutes "an inquiry into the degree of state involvement with religion."[96] In the words of the Court, "the end result [must] not [be] an excessive government entanglement with religion."[97] According to this standard, government inaction must almost always be less dangerous than action.[98] When either of two courses entails some degree of entanglement, the proper one will be that which minimizes the involvement.[99]

Applying the *Walz* standards to *Anderson*, it is difficult to see how the latter decision could escape condemnation. Whether the purpose of the regulations is "aimed at establishing, sponsoring or supporting religion" may be debatable, but that the "end result . . . is . . . an excessive government entanglement with religion"[100] cannot be questioned. In

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[90] Id. (emphasis added).

[91] 374 U.S. at 222.

[92] 397 U.S. at 672.

[93] Id. at 673.

[94] The Supreme Court, 1969 Term, 84 Harv. L. Rev. 127, 129 (1970).

[95] Id. at 130; Note, Tax Exemptions, Subsidies and Religious Freedoms After *Walz v. Tax Commission*, 45 N.Y.U.L. Rev. 876, 893 (1970).

[96] The Supreme Court, 1969 Term, 84 Harv. L. Rev. 127, 130 (1970).

[97] 397 U.S. at 674.

[98] The language of the Court leads inescapably to this inference. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but *simply abstains* from demanding that the church support the state." Id. at 675 (emphasis added). The Court also stated that "[o]bviously a direct money subsidy would be a relationship pregnant with involvement." Id. An early case to follow *Walz* picked up this language. In DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I.), prob. juris. noted, 91 S. Ct. 142 (1970), a three-judge court declared unconstitutional a state statute providing aid for teachers of secular subjects in religious schools for the reason, among others, that state subsidies would lead to unnecessary administrative involvement with the schools, and would limit their internal freedom.

[99] Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

[100] Id.

A-15

Anderson, unlike *Walz*, the choice is not between two courses involving some degree of entanglement. Rather the choice is between a course without danger of involvement and one in which the involvement reaches the point of actual sponsorship. To choose the latter course is to fly in the face of the *Walz* criteria.

Not only do the regulations violate the several establishment clause standards, but it is equally clear that the regulations violate the free exercise clause in their effect on nonbelievers. *Torcaso v. Watkins*[101] established that the state may not act in such a way as to favor believers over nonbelievers, even though in so doing the state is not favoring one religion over another.[102] This limitation applies equally to the free exercise and establishment clauses.[103] It cannot be disputed that the regulations interfere with the atheist's religious freedom since they oblige him to attend services which may in many cases be abhorent to him and which he would certainly not attend if he were at liberty to act according to his convictions. This interference, unless otherwise justified, is unconstitutional even if one accepts the claimed educational purpose of the regulations; "[t]he Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees."[104] While it may be permissible for the military to require some kind of religious training for its cadets, it is clearly interfering with their first amendment rights by forcing them to acquire this training in a way which may conflict with their beliefs.

Finally, it seems probable that the regulations constitute a religious test in violation of article VI of the Constitution.[105] The *Anderson* court was clearly correct in assuming that this prohibition was intended to be a further safeguard against a governmentally established religion. This being so, the same standards should apply to both the test clause and the establishment clause. Since the requirement of mandatory church attendance violates the establishment clause and since compliance with it is a prerequisite to graduation from the Academies because noncompliance results in expulsion,[106] there can be no doubt that the regulations establish a religious test in violation of article VI. Nor does the fact that the cadets could become officers without passing through the Academies provide a defense to this violation. While it may be true that the requirement is not a religious test for becoming an officer, it is certainly a religious test for becoming an officer by the Academy route. Since the Academies provide the elite of the military,[107]

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[101] 367 U.S. 488 (1961).
[102] Id. at 495.
[103] Cf. id. at 488.
[104] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).
[105] See note 11 supra.
[106] *Anderson* at 4.
[107] *Memorandum* at 8(a) (testimony of the Chairman of the Joint Chiefs of Staff).

21-76

the requirement is in reality a religious test for entering the highest echelons of military command. The effectiveness of this test is supported by the statement of the Chairman of the Joint Chiefs of Staff to the effect that there are no atheists or agnostics in the upper levels of military command.[108]

Nor does the fact that the test clause was to be a safeguard against an establishment of religion mean that the adoption of the establishment clause rendered it functionless. At the very least, the test clause deals a mortal blow to the argument that government office is a privilege which may be conditioned on governmentally established religious requirements.[109] Whatever validity the right-privilege distinction may retain,[110] the religious test clause means that government cannot condition the granting of public office on the expression of religious belief. If the simple language of the clause does not mean this, then it does not mean anything. Thus, the defendants cannot maintain that attendance at the Academies is a privilege which may be withheld or withdrawn because of a failure to comply with the religious requirements established by the regulations. Because they operate to bar those who do not so comply from graduating from the Academies, the regulations establish a religious test in violation of article VI.

The Academy regulations attacked in *Anderson* seem to violate

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[108] Id. See id. at 47-48.

[109] This argument was implied by the *Anderson* court when it said that the plaintiffs were notified by the catalogues of the church attendance requirement before applying to the Academies, and thus accepted the condition as a result of their decision to attend. *Anderson* at 3 n.4.

[110] It is quite clear that "the first amendment forbids the government to condition its largess upon the willingness of the petitioner to surrender a right which he would otherwise be entitled to exercise as a private citizen." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1446 (1968). In the words of Wieman v. Updegraff, 344 U.S. 183, 192 (1952): "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory." With regard to religion, the Supreme Court stated in United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947), that Congress may not "enact a regulation providing that no Republican, Jew or negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any part in missionary work." This dictum was reaffirmed in Torcaso v. Watkins, 367 U.S. 488 (1961) and Sherbert v. Verner, 374 U.S. 398 (1963). In *Torcaso* the Supreme Court struck down a state law requiring public officers to profess their belief in the existence of God, saying that "[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by . . . criteria forbidden by the Constitution." 367 U.S. at 495-96. In *Sherbert*, the Court said:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

374 U.S. at 404 (citations omitted). Thus, it is safe to say that nothing remains of the vitality of the right-privilege distinction in the realm of the religion clauses.

both the establishment and the free exercise clauses of the first amendment and the religious test clause of article VI. The only possible justification for upholding the constitutionality of these regulations would be a compelling need by the military for such a requirement. As was demonstrated, there is no such need and there are equally effective alternatives by which the military could have achieved its purpose. Thus, the court in *Anderson* should not have shown so complete a deference for military judgment where, as here, a first amendment right was involved. To do so permits the placing of minor military objectives over the clear demands of the Constitution.

United States Court of Appeals

For the District of Columbia Circuit

Case No. 24617

MICHAEL B. ANDERSON, CADET, U. S. A., *et al.*,
Appellants,

v.

MELVIN R. LAIRD, *et al.*,
Appellees.

~~MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED~~ BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, COMMISSION ON JEWISH CHAPLAINCY OF THE NATIONAL JEWISH WELFARE BOARD, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS OF THE U.S.A., NATIONAL COUNCIL OF JEWISH WOMEN, INC., RABBINICAL ASSEMBLY, RABBINICAL COUNCIL OF AMERICA, UNION OF AMERICAN HEBREW CONGREGATIONS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AND UNITED SYNAGOGUE OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases:

Other Authorities:

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For the District of Columbia Circuit

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The undersigned as counsel for the above-named organizations respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Each of these national organizations of American Jews is committed to the maintenance of the constitutional principle of religious freedom and separation of church and state, believing it to be best for government and best for religion.

We believe this case presents important issues concerning the applicability of the Establishment Clause to military personnel, the scope of rights under the Free Exercise Clause, and the meaning of the prohibition against religious tests for office contained in Article VI of the Constitution. The accompanying *amici curiae* brief, based upon extensive concern and experience in matters affecting church and state, is offered in the hope that it will make a significant contribution to the resolution of these issues before the court.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for the appellants granted consent. Counsel for the appellees denied consent in a written communication dated October 5, 1970, stating that: "It is the consistent and long-standing policy of this office not to consent to the filing of an *amicus* brief in any case, regardless of its subject matter." Therefore, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, we move for leave to file our brief *amici curiae*, which is conditionally filed with this motion.

Respectfully submitted,

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October 21, 1970

United States Court of Appeals

For the District of Columbia Circuit

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MICHAEL B. ANDERSON, CADET, U. S. A., *et al.*,
Appellants,

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MELVIN R. LAIRD, *et al.*,
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BRIEF OF NATIONAL JEWISH ORGANIZATIONS *AMICI CURIAE*

The undersigned organizations respectfully submit this brief, as *amici curiae,* in support of the appellants. The interest of the *amici* in the constitutional issues raised by this case is set forth in the motion for leave to file a brief *amici curiae* annexed hereto.

Statement of the Case

This is a suit by cadets at the United States Military Academy and midshipmen at the United States Naval Academy in their own behalf and in behalf of all other cadets (hereinafter used to include midshipmen) in all three serv-

ice academies (i.e., including the Air Force Academy) challenging the constitutionality of regulations requiring their attendance at Protestant, Catholic or Jewish worship services every Sunday. Unexcused failure to attend such services subjects the cadets to disciplinary action, including dismissal from the academies for repeated absences.

The challenge is based on both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution and also on the prohibition of religious tests for governmental office in Article VI. After a hearing which included oral testimony, the court below upheld the constitutionality of the regulations under the First Amendment and Article VI and denied plaintiffs' requests for declaratory and injunctive relief. It based its decision on the following grounds:

(1) Except in extreme circumstances, not presented by this case, the judiciary should not interfere with the management of military services.

(2) Military personnel possess more limited constitutional rights than do civilians.

(3) The long-standing tradition of compulsory chapel attendance at the academies is strong evidence of its constitutionality.

(4) Since the purpose and effect of the regulations is to make commissioned officers more effective in the performance of their combat duties, the regulations are constitutional under the purpose-effect test of the Establishment Clause.

(5) Freedom of religion is not absolute and in any event the Free Exercise Clause is not violated because it protects only freedom of worship and the regulations require only that the cadets *attend* worship services, not that they *participate* in them.

(6) Article VI of the Constitution forbids only religious test oaths for office, and no such oath is required of cadets.

Summary of Argument

The court below was in error in respect to each of these grounds; none of them supports its decision. Any claim by the military of practical immunity from judicial scrutiny of its conduct runs afoul of a tradition which is older than the Constitution going back to the birth of the nation, and has consistently been rejected by the Supreme Court. The Constitution protects military personnel as it does all other Americans. Even if, as the court below asserts, the freedoms of the First Amendment are not absolute, they may be restricted only for compelling reasons, and none have been presented in this case.

Time itself cannot convert an unconstitutional practice into a constitutional one, nor a sectarian practice into a secular one. Moreover, whatever presumption of constitutionality arises out of the passage of time is inapplicable to the present case in view of the extremely limited area of the challenged practice.

On four occasions the Supreme Court has stated that under the Establishment Clause government may neither

"force nor influence a person to go to or remain away from church against his will" nor punish him for "church attendance or non-attendance." Nothing in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) which announced the purpose-effect test or in any subsequent decision of the Supreme Court which applied it, indicates any intent to supersede these expressed prohibitions by application of the purpose-effect test. In any event, assuming the continued validity of the purpose-effect test notwithstanding *Walz* v. *Tax Commission of the City of New York*, 90 S. Ct. 1409 (1970), the regulations challenged here cannot be justified under the purpose-effect test. Certainly, they cannot stand under the *Walz* test of government involvement in and continuing surveillance of church affairs.

Nothing in the history of the Free Exercise Clause or in any decision of the Supreme Court (or indeed any other court) supports an interpretation that limits it to freedom for active participation in worship and renders it inapplicable to freedom from compulsory attendance at worship. Nor is there anything in the history of Article VI or in any decision of any court that supports an interpretation which limits it to freedom from a religious test oath and permits other religious qualifications for office such as attendance at religious services.

ARGUMENT

I

Military Immunity from Judicial Scrutiny

Decisions of the Supreme Court make it abundantly clear that, were the academies involved in this suit non-military public educational institutions, the unconstitutionality of the challenged regulations would hardly be open to question. In *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Court held unconstitutional a public school regulation penalizing by expulsion pupils who for reasons of conscience refused to participate in flag salute exercises. Religious instruction in the public schools was held impermissible in *McCollum* v. *Board of Education,* 333 U. S. 203 (1948), prayer recitation in *Engel* v. *Vitale,* 370 U.S. 421 (1962) and devotional Bible reading in *Schempp.* In *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), it held unconstitutional under the Establishment Clause a state statute forbidding the teaching of evolution in publicly supported educational institutions. In *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969), it invalidated under the freedom of speech guaranty of the First Amendment action by a public school forbidding pupils to wear black armbands as an expression of protest against the Vietnam war. Certainly, under these decisions, a regulation requiring attendance at religious services of all students in a publicly supported educational institution would not long survive judicial challenge.

The only basis for the decision of the court below[1] is that the institutions involved here are military ones established and maintained in the interests of national defense. Initially, we note that this is not the first instance in which invasions of rights under the Free Exercise and Establishment Clauses have been sought to be justified in the interests of national defense. The *Barnette* case was itself decided during our participation in World War II and the school authorities contended that the flag salute ritual encouraged national loyalty which is indispensable to national defense, a contention which, though not unreasonable, was held insufficient to justify infringement of First Amendment liberties. And in *Hamilton* v. *Regents of the University of California,* 293 U.S. 245 (1934), where the Court upheld the constitutionality of a regualtion of a state university requiring all students to participate in military training, Justice Cardozo was careful to note in his concurring opinion that

> * * * Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. * * * Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are *so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state.* * * * (293 U.S. at 266-267. Emphasis added.)

1. The court did suggest in footnote 4 that "It might well be argued that the cadets by their own choice have imposed restrictions on their activities at the Academies." The argument is not pursued further, and in the light of *Barnette, Epperson, Tinker, Torcaso* v. *Watkins,* 367 U.S. 488 (1961), *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) and *Speiser* v. *Randall,* 337 U.S. 513 (1958), does not require further consideration here.

More fundamentally, the concept that the military and its institutions are practically immune from scrutiny by the judiciary where constitutional violations are asserted is hostile to a long standing tradition which is older than the Constitution itself and goes back to the very birth of and indeed reason for our nation. One of the "abuses and usurpations" leading to "absolute Despotism" which required us to declare our independence of Great Britain was that its monarch "affected to render the Military independent of and superior to the Civil Power."

The claim that the military is independent of the judiciary has often been asserted but it has been consistently rejected by the Supreme Court. Even during the darkest years of Civil War when our survival as a nation was in grave danger, Chief Justice Taney strongly rejected the claim, asserting that, if the authority vested by the Constitution in the judiciary were usurped by the military power at its discretion, the people of the United States would no longer live under a government of laws but under military power. *Ex parte Merryman,* Fed. Cases No. 9487 (1861). This position was vindicated five years later by the Supreme Court in the historic decision of *Ex parte Milligan,* 71 U. S. 2 (1866).

Closest in point is the Court's decision in *Harmon* v. *Brucker,* 355 U.S. 579 (1958) wherein it refused to accept the Army's claim that its power in issuing particular types of discharge of inductees and its discretion in issuing certificates of less than honorable discharge were not subject to judicial review.

The crux of these decisions and others that might be cited is that the mandates of the Constitution do not stop

at the gates of military establishments; nor are there two separate and unequal constitutions, one for the United States generally and the other for military enclaves within its borders.

Cadets in a military academy concedely are a special community, and special communities present special problems. Military cadets are, however, not the only special community in our society; so too are public school children and inmates of penitentiaries. *Barnette, Epperson* and *Tinker* indicate that public school authorities have asserted the same claim of immunity from judicial scrutiny under the First and Fourteenth Amendments by reason of their special circumstances and problems. The numerous Black Muslim cases[2] show that the same claim, with perhaps more cogency, has often been made by prison authorities. But the decisions in all these cases teach that however special the problems may be they must be resolved within the limits imposed by the Constitution and subject to review by that branch of government which has been entrusted with the responsibility of final determination as to whether those limits have been transgressed. In short, as the Court in *Milligan* stated:

> • • • The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances • • • (71 U.S. at 120-121).

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2. E.g., *Pierce* v. *LaVallee*, 293 F. 2d 233 (1963); *Sostre* v. *McGinnis*, 334 F. 2d 903, cert. denied, 379 U.S. 892 (1964); *Sewell* v. *Peyelow*, 291 F. 2d 196 (1961); *Banks* v. *Havener*, 234 F. Supp. 27 (1964); *Brown* v. *McGinnis*, 180 N.E. 2d 791 (N.Y. 1962).

II

The Restricted Rights of Military Personnel

"There is nothing revolutionary," the court below stated, "in concluding that one logically distinguishable group in society enjoys more limited rights than ordinary individuals. * * * Nor is it revolutionary to say that First Amendment rights are not absolute."

One can accept both statements (although Justice Black at least would probably qualify his agreement if he would agree at all) without in any way conceding that compulsory chapel for cadets is any more constitutional than for students at state universities or inmates in prisons. In every case, those contending for lesser rights to a particular group than are enjoyed by others must, under the Equal Protection Clause and its Federal equivalent, the Due Process Clause, establish that the group is materially different from others. If First Amendment rights are involved, they must in addition establish compelling reasons for restricting the rights of its members. As the Court said in *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963):

> We must * * * consider whether some compelling state interest * * * justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430.

As we seek to indicate below, the evidence presented in this case falls far short of meeting this test. Indeed, there is nothing in the record to show any need, much less a compelling need, for the regulation other than the statements of the military officials who seek to perpetuate the practice. If that is held sufficient to deprive persons of their First Amendment rights, the Amendment might just as well not have been written.

III

Tradition as Evidence of Constitutionality

"Tradition," said the court below, "carries weight and demands recognition." The "unbroken pattern of 150 years of mandatory chapel" at the military academies is strong if not conclusive evidence of constitutionality.

Initially we note that the tradition *against* mandatory chapel is much older than 150 years; it is older than twice 150 years. In 1654, Roger Williams, who may rightfully be called the founder of America's dual principle of religious freedom and church-state separation, wrote a letter to the Town of Providence in which he said:

> There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, *that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship,* nor compelled from

> their own particular prayers or worship, if they practice any. I further add, that I never denied, that notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers. 1 Stokes, *Church and State in the United States,* 197 (1950) (Emphasis added.)

The District Court's inference of constitutionality from time brings to mind Alexander Pope's couplet in his *Essay on Man* (Epistle I):

> And, spite of pride, in erring reason's spite,
> One truth is clear: Whatever IS, is RIGHT.

Acceptance of the concept that what is is right and constitutional and therefore ought to continue would stagnate constitutional development. Not surprisingly it has never been accepted and rarely given weight by the Supreme Court, as the following instances evidence:

(1) *Malapportionment.* Even before the Constitution was adopted, legislative malapportionment existed and was widespread. Madison referred to it in 1786 in his Memorial and Remonstrance Against Religious Assessments.[3] This fact did not deter the Court from declaring in *Baker* v. *Carr,* 396 U.S. 186 (1962) and its numerous successors, that malapportionment is unconstitutional.

(2) *Public school sponsored Bible reading and prayer recitation.* This is a practice which goes back to the very

3. " 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people." Appendix to *Everson* v. *Board of Education,* 330 U.S. 1, 70-71 (1947).

beginning of the public school system.[4] Nevertheless, the Court held the practice to be unconstitutional in *Engel* and *Schempp*.

(3) *Racial segregation in public schools.* Segregated public education was widespread, North and South, when the Fourteenth Amendment was adopted,[5] and remained so long thereafter. Nevertheless, the Court found the practice unconstitutional in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

(4) *Income tax.* For a century after *Hylton* v. *United States*, 3 Dall. 171 (1796), it was universally assumed that a tax on personal property or the income from personal property was not a direct tax and therefore was constitutional. In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Court held it to be unconstitutional.[6]

(5) *Federal common law.* For a century after *Swift* v. *Tyson*, 16 Pet. 1 (1842), it was universally assumed that Federal courts were not constitutionally bound in diversity cases to follow the state courts' interpretation of the common law. In *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) the Court held to the contrary.

It is true that, in *Walz*, the Court in upholding the constitutionality of tax exemption for churches gave some weight to the fact that the practice had gone on unchallenged for many years. It was, however, not time alone on

4. Pfeffer, *Church, State and Freedom*, 436 (Rev. ed., 1967).

5. See *Roberts* v. *City of Boston*, 5 Cush. 198 (1850); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

6. We need hardly note that we do not necessarily agree with the correctness of the Court's decision in that case.

which the Court relied but even more on the universality of the practice. The Court pointed out that all of the 50 states, besides Congress, provide for tax exemption of places of worship, and have done so without challenge since the nation was established. That is a far cry from drawing a similar inference in respect to a practice limited to a few military academies (one of which is barely two decades old) in a strictly disciplined environment where dissent is strongly discouraged and judicial challenge practically unheard of.[7]

Age, we submit, does not prove constitutionality nor does it relieve a court from deciding for itself whether a practice asserted to violate the First Amendment is or is not constitutional.

Interestingly, the court below also used the evidence of time to support constitutionality in a different way, one diametrically opposite to and contradictory of the inference from the mere passage of time. If the inference has any validity at all, it must rest on the fact that everything has remained the same during the passage of time; it has no validity if the practice has changed. But the District Court also asserted that "the purpose of a statute or regulation can change over the years, from 'the impermissible purpose of supporting religion' to 'the permissible purpose of furthering overwhelmingly secular ends.' "

This is undoubtedly valid and indeed was the basis for upholding the constitutionality of compulsory Sunday laws

7. It is not without significance that the court below found it necessary to grant plaintiffs' motion forbidding the Academies from disciplining the cadets and midshipmen for their involvement in this suit.

in *McGowan* v. *Maryland*, 366 U.S. 420 (1961). But, as noted in that case, this use of time constitutes an implicit (in *McGowan* it was explicit) admission that the practice, though unchallenged for many years, was nevertheless unconstitutional.

There is a critical difference between *McGowan* and the present case, one which makes the District Court's assertion of change of purpose completely untenable. In *McGowan*, the Court used a considerable portion of its opinion to show the changes that had occurred during the years manifesting the change in legislative purpose from religious to secular, e.g., legislative statements, reports of investigating committees on the need for a rest day each week, liberalization of the laws to allow amusement and entertainment, intervention by labor unions in support of the laws, etc. (366 U.S. 433-435, 447-449). In the present case nothing has changed except the intervention of the purpose-effect test in *Schempp* and *Board of Education* v. *Allen*, 392 U.S. 236 (1968). A reading of the record in this case cannot but lead to the conclusion that, had the Supreme Court not announced the purpose-effect test in *Schempp* and *Allen*, it would never have occurred to the officials of the Academies that their purpose in continuing the practice was secular.

Time itself, we submit, cannot convert a sectarian practice into a secular one or an unconstitutional practice into one that is constitutional.

IV

The Establishment Clause

It seems somewhat strange to be required to argue that compulsory attendance at religious worship is inconsistent with the First Amendment's prohibition of laws respecting an establishment of religion. As is indicated by the letter of Roger Williams which we have quoted above, the long and ultimately successful struggle for disestablishment started with opposition to compulsory attendance at worship. Both Justices Black and Rutledge in their opinions in *Everson* referred to compulsory church attendance as one of the practices of establishment which the First Amendment was written to forbid (330 U.S. 1, 9, 44). As late as 1776, Virginia had a law penalizing "forbearing to repair to church" (*McGowan*, 366 U.S. at 438). The great Virginia Statute Establishing Religious Freedom, long recognized as the predecessor of the First Amendment, provided that "no man shall be compelled to frequent or support any religious worship, place or ministry" (330 U.S. at 28).

In the light of this historical background, it is hardly surprising that on four different occasions the Supreme Court has said:

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church* against his will or force him to profess a belief

> or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (*Everson,* 330 U.S. 1, 16; *McCollum,* 333 U.S. 203, 210; *McGowan,* 366 U.S. 420, 443; *Torcaso,* 367 U.S. 448, 492-493. (Emphasis added.)

A. Purpose and Effect

What the court below held in effect was that this oft-stated specific prohibition against governmental compulsion to attend religious worship and the long historic tradition upon which it is based have been superseded by the purpose-effect test stated in *Schempp,* and that *Schempp* has now made constitutional a practice which the First Amendment was written to forbid. In passing upon the validity of this holding, it is appropriate to consider the statement of the greatest of all Chief Justices in his opinion in *United States* v. *Aaron Burr,* 4 Cranch 470, 482 (1807):

> * * * [A]n opinion which is to overrule all former precedents and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established.
>
> * * *
>
> General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. * * *

What did *Schempp* say? In invalidating under the Establishment Clause a statute providing for prayer and devotional Bible reading in the public schools the Court said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (374 U.S. at 222.)

It is ironic that compulsory attendance at religious worship should be sought to be justified by a test announced and applied in a decision which specifically *forbade* the practice; for, as in the present case, the practice invalidated in *Schempp* did not require the children to participate in the devotional Bible reading and prayer recitation but merely to be present while it took place, and indeed allowed parents if they wished to keep their children out of school while the services were being conducted.[8]

It is even more ironic that, as in the present case, so too in *Schempp,* it was sought to justify the practice on the ground that the purposes were secular.

> * * * Included within its secular purpose, it [the State] says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. (*Id.* at 223.)

8. "The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises." 374 U.S. at 207.

Assertion of a secular purpose to justify a religious statute is not a recent invention; it goes back to the origins of the Establishment Clause. The Virginia measure[9] whose defeat led quickly to the enactment of the Statute Establishing Religious Freedom and shortly thereafter to the First Amendment sought to impose a tax "for the support of Christian teachers." The purpose of the measure was set forth in its preamble and was entirely and exclusively secular:

> *A Bill Establishing A Provision for Teachers of the Christian Religion.*
>
> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies or communities of Christians; * * *

(The phrase "liberal principle heretofore adopted" refers to Article 16 of the Declaration of Rights in the Virginia constitution of 1776 which stated that "all men have an equal title to the free exercise of Religion according to the dictates of conscience." It is both interesting and amusing to note this early instance of what has become

9. Set forth as an Appendix to *Everson*, 330 U.S. at 72.

standard operating procedure whenever a measure to involve government in religious affairs is defended, a protestation that it really does not "counteract" religious freedom or church-state separation.)

In his historic *Memorial and Remonstrance* which successfully mobilized opposition to the measure, Madison, the author of the First Amendment, responded that to "employ religion as an engine of Civil policy" would be "an unhallowed perversion of the means of salvation" (330 U.S. at 67).

The use by the Defense Department of the purpose-effect justification in the present case is almost the *reductio ad absurdum* of that test and such increasingly frequent use may explain at least in part why the Supreme Court avoided it in *Walz*, the latest decision under the Establishment Clause. The "purpose-effect" formula has in the few short years of its existence become something of a verbal talisman whose mere incantation is deemed sufficient to exorcise the ghost of unconstitutionality.

Put simply, the Defense Department justified the regulations in terms of the purpose-effect test in that the purpose of requiring cadets to attend weekly services at churches or synagogues each Sunday morning[10] is to make better and more effective combat officers of them and that the effect of the requirement is to accomplish that purpose.

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10. It should be noted that for Jews the Sabbath is not Sunday but Saturday, and that the major religious services are held in synagogues on Saturday rather than Sunday morning. Comparatively few Jews attend synagogue worship services on Sunday mornings.

The court below culled from the testimony of the Defense officials what it presumably deemed most cogent in establishing secular purpose and effect. We set it forth here because we believe a mere reading of it shows its insubstantiality.

Assistant Secretary of Defense Kelley testified:

> One of the most challenging aspects of officership is the ability to draw out the best in the people who are subordinate to that officer's command, and the ability to draw out the best in those people requires, beyond any question, an understanding of the spiritual value system that those people use as a basis for conducting their lives and this spiritual value system is put to the most rigorous test in military life, particularly in conditions of combat and crisis.
>
> * * *
>
> The opportunity to observe others at worship is clear manifestation of the manner and the extent to which they draw upon God or a supernatural being in the conduct of their lives.
>
> * * *
>
> Very simply the reason for the requirement is to help the midshipmen and the cadets understand the basis of religious belief and practice on the part of other midshipmen and cadets and thus equip him for positions of leadership responsibility in later service life.
>
> * * *
>
> The institutional judgment of the Department of Defense as to the primary effect of required chapel attendance is to develop in those required to attend chapel an understanding of the religious beliefs and the spiritual value systems of other midshipmen and cadets * * *

> I meant primary effect of requiring attendance at chapel is to instill in a midshipman the understanding of the religious beliefs of others.

Admiral Moorer testified:

> The purpose, of course, is to enhance his leadership and command ability by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a leader in later years, he will appreciate this impact that religion will have on so many people.
>
> * * *
>
> [T]hat is the sole purpose. We are in the process of developing leaders and this is a vital part of the overall leadership package; and that is the sole purpose.
>
> * * *
>
> The primary effect is to generate in the individual a better understanding of the impact, related on the lives of men, and certainly permitting them in the future to be better leaders.
>
> * * *
>
> When we experience a crisis situation, different men react in different ways, and it is very important that the commander, or the senior man on the scene of the conflict or difficulty, understands why the various men in his command will react in a different way, and why some of them find a need to resort to religion to support them in this time of extreme danger and extreme trial. And unless he understands that many people have this feeling and have this need to resort to their religious beliefs to provide strength to them in this period of crisis, he cannot properly, in my view, handle this crisis situation.

In *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1937) the Court suggested (at p. 152, Footnote 4) that

governmental action restricting First Amendment rights may be subject to a "more exacting judicial scrutiny" than other types of governmental action. But, we submit, even ordinary judicial scrutiny cannot but lead to the conclusion that what the Defense Department's witnesses did was to seek to rationalize in terms of purpose-effect a practice which in reality has little purpose and less effect in respect to any objectives within the Department's constitutional competence. In support of this assertion we ask the following questions:

1. What can a cadet learn by watching men's behavior in the peace, quiet and solemnity of a church service that would be helpful to him in a combat situation on the battlefield or, for that matter, anywhere else but in a church during religious services?

2. If anything relevant and useful is thus learned, can it not be learned in one or two visits to a church? What additional knowledge is gained by repeating the process Sunday after Sunday, month after month, year after year, during the cadet's entire four-year stay at the military academy?

3. If there is militarily valuable knowledge that can be gained by watching men at worship, why is the cadet required to attend services of his own faith? Would it, in fact, not be wiser to require him to choose services of another faith, for it is quite likely that he has attended services of his own faith all his life and could hardy gain additional knowledge from continued attendance?

4. Why is he limited to attendance at the services of one faith and not required to attend at the worship of many

faiths, for is it likely that in a religiously pluralistic country such as the United States he will ever have soldiers of only one faith under his command?

5. Why is parental consent required if an under-age cadet wants to change from attendance at the worship of one faith to that of another? Is such consent required if he wants to drop a course in French and substitute for it one in Spanish?

6. Why, in such a situation, is the approval of the respective chaplains involved required?

7. Why must the cadet "demonstrate a sincere desire to affiliate with the new church"? What has this to do with his ability to lead the soldiers under his command?

8. Why is the cadet not tested and graded on what he learned in church as he is in respect to all other courses taken at the academy he attends?

9. Would not instruction by competent psychologists and military chaplains (who, after all, have had many years of experience in observing the combat and crisis behavior of religiously committed soldiers) be superior pedagogically to the unguided, passive observations of an untrained young college student?

10. At West Point all cadets are required to attend chapel services on the Academy premises; at Annapolis, they may opt for attendance at the Academy chapel in lieu of attendance at a denominational church in town. In these circumstances how will the cadets be observing potential

soldiers under their command? Moreover, as the court below emphasized as not merely important but "crucial," the cadets are not themselves required to participate in worship but only to observe others at worship. If so, is it not possible that a cadet in an Academy chapel may find himself engaged in observing other cadets engaged not in worship but in observing him observing them, in a sort of never-ending multi-faceted mirror?

Questions such as these can easily be multiplied, but these are enough to suggest that, were it not for the fact that the court below believed it, one would find it difficult to escape the conclusion that the Defense Department's rationalization borders on the incredible. Certainly the evidence in its support falls far short of the minimum required to justify constitutionally a practice so contrary to the Establishment Clause.

B. The *Walz* Test and Surveillance

In the *Walz* case, the latest examination into the meaning of the Establishment Clause by the Supreme Court, it was held that if the purpose of a law is to advance or support religion it is unconstitutional. But even if that is not its purpose, the law is still unconstitutional if its end result or effect is "an excessive government entanglement with religion" (90 S. Ct. at 1414). The Court said (in upholding tax exemption of churches):

> Granting tax exemption to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive and

> *whether it is a continuing one calling for official and continuing surveillance* leading to an impermissible degree of entanglement. (*Ibid.* Emphasis added.)

We do not know whether the Academy authorities inform the pastors and rabbis of the town churches and synagogues that the uniformed cadets they see enter every Sunday morning are not there to pray or receive spiritual help but to keep under observance those males of potential military age who do come to worship and pray. We are inclined to doubt that the Academy authorities do so because we believe that most pastors and rabbis would be extremely reluctant to play the game. While Isaiah prophesied that God's "house shall be called a house of prayer for all peoples" (Isaiah 56:7), and this of course included military people, what he clearly had in mind was that they should come to pray and not to observe those who are at prayer. Nor do we know if the young male worshippers are informed that their behavior during religious services is being observed and studied by the military, but again we doubt that this is so; after all, unlike cadets, civilian males are not required to attend religious services and it is not unreasonable to suppose that many who do would discontinue the practice if they were aware that they were under continuous observance by the military while they were worshipping.

In any event, whether or not the pastors and rabbis or the congregations are aware of the true situation, surveillance there certainly is within the meaning of *Walz*. The cadets are under surveillance by their military superiors to assure their faithful attendance, and the male worshippers are under surveillance so that the military can

learn how to make more effective soldiers of them. Continuing, too, is the surveillance; it continues throughout the services week after week and not merely for the four years the cadet is at the Academy, but since each year a new class of cadets is admitted to the Academies, it continues for as long as the congregation continues. Finally, no matter how liberally one interprets and applies the *Walz* test, it is impossible to characterize the surveillance as anything less than excessive.

Government surveillance of religious services has a long and ignoble history. During the period before the Maccabean revolution and later during the period of Roman domination of Judea, governmental officials entered the synagogues to make sure the worship did not offend the Selucid or Roman monarch. Until Jews were expelled from Spain in 1492, agents of the Inquisition and apostate informers visited synagogues to apprehend any converted Christians who might be there. In Czarist Russia government spies attended synagogue services to make sure that the compulsory prayers for the welfare of the Czar were recited. Wherever there has been an established church, there is a history of governmental surveillance of church services to uncover heresy in worship and in totalitarian states to uncover sedition in sermons.

Revulsion to governmental and particularly military intrusion upon sacred premises is reflected in the Biblical prohibition to which the only exception is when the intrusion is necessary to apprehend a deliberate murderer (1 Kings, 1:50; 2:28). It is reflected too in the Supreme Court decisions forbidding governmental involvement in intra-church disputes. *Kedroff* v. *St. Nicholas Cathedral,* 344

U.S. 94 (1952); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969). It is reflected, finally, in the test for violation of the Establishment Clause announced and applied in *Walz.* It is this national and constitutional policy which, we submit, is violated by the practice challenged in this case.

C. Religion as a Means to a Secular End

In his concurring opinion in *Schempp,* Justice Brennan said (374 U.S. at 265):

> * * * the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, *however legitimate they may be,* at least without the clearest demonstration that nonreligious means will not suffice. (Emphasis added.)

It was on this principle that he based his concurrence in *Walz,* and it is a principle which we believe is fully consistent with the history and purpose of the Establishment Clause.

As has been noted, one of the arguments stated by Madison in his *Memorial and Remonstrance* in opposition to taxation for religious purposes, was that government's employment of "Religion as an engine of Civil policy * * * [is] an unhallowed perversion of the means of salvation." The great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purpose of the other."[11]

11. Black, J.S., *Essays and Speeches,* p. 53 (1885).

To hold that government may as a matter of less than overriding necessity employ religion as a means to effect secular ends which are properly within governmental competence would go far toward making the First Amendment meaningless. Practically every defense of religious instruction in public schools is predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goals of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education. Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism, and Judaism,[12] are more likely to inculcate good citizenship than others (Jehovah's Witnesses or the Black Muslims, for example) and, therefore, could aid the former and not the latter, a conclusion we doubt any court would accept today.

Measured by the standard that religion may not be used to serve secular interests in the absence of convincing proof of overriding necessity, the regulation for compulsory attendance at religious services cannot stand. The only evidence to support the claim of necessity are assertions by Assistant Secretary Kelley and Admiral Moorer quoted above to the effect that personal observation is more effective educationally than carefully prepared programs of instruction by trained and competent educators, psychologists and chaplains. The Defense Department called no educator, psychologist or chaplain to support the assertions of Mr. Kelley and Admiral Moorer. The unsupported assertions fall far short of the convincing proof of overriding necessity called for by Justice Brennan.

12. Only these three faiths are recognized in the regulations challenged herein.

V

The Free Exercise Clause

Much of what we have said in respect to the Establishment Clause is equally applicable to the Free Exercise Clause. Certainly no less convincing proof of overriding necessity will suffice to justify infringements on the free exercise of religion than upon the separation of church and state. As the Court said in *Prince* v. *Massachusetts,* 321 U. S. 158, 164 (1944):

> • • • [I]t may be doubted that any of the great liberties insured by the First Article can be given a higher place than the others. All have preferred position in our basic scheme. • • • All are interwoven there together. • • •

The court below referred to a policy statement by the Superintendents of the Academies at a conference held in April, 1969 that

> It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with the sincerely held convictions of individual cadets or midshipmen.

The court interpreted this to mean that "a cadet who has sincerely held convictions against church or chapel attendance itself may be excused from attendance."

We do not believe that the statement supports the court's inference; it is a policy statement rather than a mandate, stating what ought to be done rather than what is done. Even as a policy statement it is completely inconsistent with the claim of overriding necessity. Admiral Moorer testi-

fied that attendance at religious services "is a vital part of the leadership package." The District Court's opinion states that "it is a vital part of the overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command." "It would," the court also said, "be as inconsistent with the responsibility the Academies have to train complete combat officers to ignore this necessity as it would be to ignore the more obvious physical and tactical education."

If this be so, how can the Superintendents issue a policy statement that cadets having sincerely held convictions may be excused from attendance at worship? If attendance is so "vital" to the cadet's training as a combat officer, are not the Superintendents risking national security by allowing any future combat officer to absent himself from church or synagogue? Would it not be wiser to require him to choose between his conscience and his future career as a combat officer? If attendance at worship is as "vital" as participation in "the more obvious physical and tactical education," why are conscientious objectors to attendance at worship given more favored treatment than those objecting to "the more obvious physical and tactical education"? Would, for example, one who has sincerely held conscientious objections to the use of nuclear weapons be permitted to continue at any of the Academies without taking the prescribed courses on the use of nuclear weapons?

We have said that the policy statement is not a mandate or a statement of what is actually done. There is nothing in the record showing that any cadet has ever been exempted from the requirement of attendance at religious services; certainly none of the plaintiffs in the present case have.

There is no evidence that any cadet has ever been informed of the option to be excused by reason of conscience; none of the Regulations make provision for exemption. The Air Force Regulation states that "Attendance * * * is mandatory"; the Naval Academy Regulation states that "All Midshipmen will attend church or chapel services. * * *" The West Point regulation provides that "Attendance at Chapel is part of a cadet's training; *no cadet* is exempt." (Emphasis added.) We cannot conceive of language which can be more unqualified and more unambiguous.

Even if the policy statement reflected what actually is rather than what ought to be, and that discretionary power to exempt by reason of religious conscience is possessed by the appropriate military authorities, that fact would not render the regulations immune from successful constitutional challenge under the Establishment Clause, as *McCollum, Engel* and *Schempp* all make clear. In *Barnette,* the Court, in considering the constitutionality of compulsory flag salute exercises in public schools, said:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.
>
> The Gobitis decision, however, *assumed,* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and re-

> jected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power * * * (319 U.S. at 634.)

The Court's examination led it to the conclusion that the state did not have power to impose flag salute discipline on public school children generally. While the decision was based on the Freedom of Speech rather than the Free Exercise Clause, the decision is generally regarded as a Free Exercise one and in either event the constitutional answer is the same.

The District Court in the present case did not place much weight upon the effectiveness of the policy statement to remove the Free Exercise problem from the case. Throughout its opinion, it refers to "mandatory" and "compulsory" attendance, implying that for all practical purposes there is no escape from attendance. Instead, the court places its main reliance on the fact that the regulations require only that the cadets *attend* religious services, not that they participate therein. "The cadets," the court's opinion states, "are required only to *attend* church or chapel services and to remain attentive in keeping with the avowed purpose of the activity; they are not required to participate in the service or worship." (Emphasis in original.) While the court recognized that the distinction between "attendance" and "worship" might be said to be slight, nevertheless "it is in this case crucial."

The District Court cited no authority for this "crucial" distinction, which is not surprising in view of the fact that as far as we have been able to discover none exists. No such distinction is found in the history of religious liberty in this country. What were probably the earliest statutes in what was later to become the United States, the "Lawes Divine, Moral and Martial" decreed by Governor Thomas Dale of Virginia in 1612, provided penalties for non-attendance at religious services, for the first offense, stoppage of allowance; for the second, whipping; for the third, the galleys for six months.[13] The quotations from *Everson, McCollum, McGowan* and *Torcaso* set forth above all speak of "go[ing] to or * * * remain[ing] away from church," and "church attendance and non-attendance."

We submit that the distinction between attendance and participation is not constitutionally "crucial"; indeed, we submit that none exists.

VI

Religious Test for Governmental Office

Article VI of the Constitution provides in part that

> * * * no religious Test shall ever be required as a Qualification to any office or public Trust under the United States.

As we understand the District Court's opinion, this prohibition was directed against religious test oaths and the reason for it was "to keep the Federal Government from creating an established religion." Since no test oath is required in the present case and the "Court having deter-

13. S. Cobb, *The Rise of Religious Liberty in America* 78 (1902).

mined that there is no violation of the Establishment Clause in the mandatory attendance regulations, it necessarily follows that there can be no violation of the test oath prohibition."

The District Court recognizes that there is no case law to support this interpretation but asserts that it is consistent with the history of the clause. We submit that the regulations do constitute a religious test within the plain language of the Article and within the intent of those who wrote it.

On its face, the prohibition, though in the same section as the one which prescribes oaths to uphold the Constitution, is not limited to religious test oaths but forbids all religious tests as qualification for office. There is nothing ambiguous in this language; can anyone contend that a requirement to attend religious services in order to receive a commission as an officer is not a religious test as a qualification for office? The logic of the District Court's holding is that Congress could constitutionally bar atheists from holding Federal office[14] (so long at least as it does not accomplish this by requiring them to take an oath that they believe in the existence of God)[15] since it would seem clear that merely barring atheists from office does not create an established religion.

There is no doubt that a religious test for office is closely related to creating an established religion, but it goes beyond that and has a force of its own independent of the

14. This may well be the de facto situation in the military in view of Admiral's Moorer's testimony that there are no atheists or agnostics in the upper levels of military command (Tr. 209, April 28, 1970).

15. *Cf. Torcaso* v. *Watkins, supra.*

creation of an established religion. Madison recognized this, as can be seen from the following extract from a letter he wrote to Edmund Randolph in April, 1788 before the Establishment Clause was added:

> * * * As to the religious test, I should conceive that it can imply at most nothing more than that without that exception, a power would have been given to impose an oath involving a religious test as a qualification for office. The constitution of necessary offices being given to the congress, the proper qualifications seem to be evidently involved. * * *[16]

The history of New York furnishes an illustration. Article 42 of the 1777 constitution of that state (still in effect when the Federal Constitution was adopted in 1787) provided in part:

> it shall be in the discretion of the legislature to naturalize all such persons, and in such manner as they shall think proper; provided all such of the persons * * * being born in parts beyond sea, and out of the United States of America, shall come to settle in, and become subjects of this State, and [shall] abjure and renounce all allegiance and subjection to all and every foreign King, Prince, Potentate and State, in all matters ecclesiastical as well as civil.

Historically, this oath, obviously directed against Roman Catholics, was related to the creation of an established religion; it came in fact from the Oath of Supremacy of Elizabethan England, which officially established the Anglican Church. But there was no established church in New York in 1777 and no one contemplated that one might be created; the Constitution itself contained no prohibition

16. Quoted in 1 Stokes, *Church and State in the United States,* 524 (1950).

against it. The provision was adopted by a majority of the convention out of a belief that the oath would be useful against any attempt by popish or other forms of Old World reaction to subvert the new state.[17]

Another illustration from history is found in the long struggle in Maryland to remove the disqualifications of Jews from public office during the first half of the nineteenth century at a time when there was no established religion in that state.[18]

The presence of Article VI in the Federal Constitution did not meet the objections of those who feared the creation of an established church.[19] As stated by R. Freeman Butts:

> The Convention was apparently willing to outlaw religious discrimination among federal office holders but not at this stage to prohibit religious establishments as a protection for the equal rights of conscience. But the people of several of the states were not satisfied with this partial achievement. New York, Virginia, and New Hampshire ratified the Constitution but proposed amendments for a bill of rights, specifically including religious freedom and disestablishment. North Carolina and Rhode Island would not ratify until a bill of rights, including religion, was adopted. The "public clamor" for a more thoroughgoing separation of church and state was so great that Madison and others could persuade several states to adopt the Constitution as framed at the Convention only after promising to work for the addition of amendments that would genuinely protect civil liber-

17. J. W. Pratt, *Religion, Politics and Diversity: The Church-State Theme in New York History*, 95 (1967).

18. See M. Altfeld, *The Jew's Struggle for Religious and Civil Liberty in Maryland* (1924).

19. R. A. Rutland, *The Birth of the Bill of Rights* 127 (1955).

> ties in a specific bill of rights in which freedom and equality of religious conscience played a prominent and fundamental part.[20]

The debates in Congress surrounding the framing of the Establishment Clause show conclusively that far more than religious disqualification from governmental office was involved in establishment.[21] They show, as does the rest of the evidence, equally conclusively that the regulations challenged herein constitute a forbidden religious test for office and would be so held had there never been an Establishment Clause in the First Amendment.

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20. Butts, R. Freeman, *The American Tradition in Religion and Education* 72 (1950).

21. 1 Stokes, *Church and State in the United States* 541, 548 (1950).

Conclusion

The Academy regulations for compulsory attendance at religious services are archaic vestiges which even from the beginning were inconsistent with American traditions of religious freedom. They should long since have been voluntarily removed by the military authorities. The failure of the latter to do so leaves the court with no alternative but to declare them unconstitutional.

Respectfully submitted,

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October 21, 1970

Sept 7 - To end forced & frequent religious work to place

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MICHAEL B. ANDERSON, CADET, U.S.A. et al.,	)	
Appellants	)	No. 24617
v.	)	
MELVIN R. LAIRD, et al.,	)	
Appellees	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[redacted]

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
AS AMICUS CURIAE

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As Amicus Curiae

In The
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MICHAEL B. ANDERSON, CADET, U.S.A. et al.,	)	
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CASES

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MICHAEL B. ANDERSON, CADET, U.S.A. et al.,	)	
Appellants	)	No. 24617
v.	)	
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE ON BEHALF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS URGING REVERSAL

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is made up of public affairs committees from the American Baptist Convention, Baptist General Conference, National Baptist Convention of America, National Baptist Convention, U.S.A., Inc., Progressive National Baptist Convention, Inc., North American Baptist General Conference, Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have more than twenty-three million members with a direct interest in church-state relations. The Baptist Joint Committee on Public Affairs

has as one of its mandates to act "whenever Baptist principles are involved in, or are jeopardized through, governmental action..." Religious liberty, which comprehends the concept of religious voluntarism, is a fundamental religious principle among Baptists. That principle is also an important constitutional principle of American government. In the opinion of the Baptist Joint Committee that principle is jeopardized by the decision of the United States District Court for the District of Columbia, dated July 31, 1970, which is on appeal in this case.

QUESTION PRESENTED

Technically, the question is presented: Did the United States District Court for the District of Columbia err in holding that the requirement for compulsory chapel attendance by the cadets and midshipmen at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado, does not violate either the "establishment" or "free exercise" clause of the First Amendment of the Constitution of the United States of America and does not constitute a religious test for holding an "office or public trust under the United States" as forbidden by Article VI of that Constitution? More specifically the question may be stated: Does the federal Constitution prohibit the government, its agents, and/or its instrumentalities from requiring attendance at religious services by cadets and midshipmen at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado?

STATEMENT OF THE CASE

Appellants, two cadets of the United States Military Academy and nine midshipmen of the United States Naval Academy, brought suit in the United States District Court for the District of Columbia as a class action on behalf of all cadets and midshipmen. The appellees are the Secretary of Defense and the Secretaries of the Army, Air Force, and Navy.

Appellants claim that regulations promulgated by the appellees making attendance at religious services at chapel mandatory are in violation of the "no establishment" and the "free exercise" clauses of the First Amendment and of Article VI of the Constitution of the United States of America. They sought (1) a declaratory judgment that compulsory church or chapel attendance violates these provisions of the Constitution, and (2) a permanent injunction forbidding the Academies from enforcing the regulations and from disciplining those cadets involved in the court action.

On July 31, 1970, Judge Howard F. Corcoran of the United States District Court for the District of Columbia denied that compulsory chapel attendance violates the Constitution and denied appellants' motion for a permanent injunction against enforcement of the requirement. The court did enjoin the Academies from disciplining the cadets and midshipmen for their involvement in the suit.

SUMMARY OF ARGUMENT

1. By requiring attendance of cadets and midshipmen at religious services the Academies have, in fact, established official religions and the exemption from attendance of those who object does not absolve appellees from their offense against the "no establishment" clause of the First Amendment.

2. By compelling cadets and midshipmen to attend religious services appellees are providing for compulsory religion and, thereby, are prohibiting the "free exercise" of religion provided for in the First Amendment.

3. Mandatory chapel attendance constitutes a religious test for holding an office or public trust under the United States in violation of Article VI of the Constitution.

4. The principle of religious liberty which has permeated American constitutional development demands that government not use religion for ends appropriate to itself.

ARGUMENT

1. By requiring attendance of cadets and midshipmen at religious services the Academies have, in fact, established official religions and the exemption from attendance of those who object does not absolve appellees from their offense against the "no establishment" clause of the First Amendment.

In Walz v. Tax Commission, 397 U.S. 664 (1970), the Supreme Court noted (at 668) that the "no establishment" clause of the First Amendment is not drawn with great precision. Yet the Supreme Court has interpreted the clause in several specific ways:

> "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activities." Id., at 668. (Emphasis added)

"The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id., at 669. (Emphasis added)

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." Everson v. Board of Education, 330 U.S. at 15-16 (1947).

The Supreme Court in Walz v. Tax Commission, 397 U.S. at 670-671, noted its continued support of this construction of the meaning of establishment. It was equally emphatic in McCollum v. Board of Education, 333 U.S. 203 (1948), McGowan v. Maryland, 366 U.S. 420 (1961), and Torcaso v. Watkins, 367 U.S. 488 (1961).

The argument that persons who object to attendance at religious services may be excused ignores the fact that an agent of the state, having erected a structure of coercion, has violated the First Amendment's ban on establishment even when attendance may be excused on objection.

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, 370 U.S. at 430.

Similarly, a rule having the force of law issued by a responsible agent of the government must be free of compulsion in the field of religious liberty.

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Id., at 430.

The Supreme Court in Abington School District v. Schempp, 374 U.S. 203 (1963), saw a breach in the "no establishment" clause of the First Amendment even when students were allowed to absent themselves from state-sanctioned reading from the Bible.

For the Academies to require attendance at religious service -- even though they may argue that the requirement to attend is not a requirement to worship --

meets all of the tests the Supreme Court has established for compulsion which violates the "no establishment" clause of the First Amendment.

2. By compelling cadets and midshipmen to attend religious services, appellees are providing for compulsory religion and, thereby, are prohibiting the free exercise of religion.

The "free exercise" clause of the First Amendment clearly prohibits the use of state action to deny the rights of free exercise to anyone. [see Abington School District v. Schempp, 374 U.S. 203 (1963)]

A tradition of compulsory chapel attendance which has developed unchallenged over a number of years has, no doubt, a backlog of acceptance. However, long usage of a wrong or unconstitutional policy does not make such usage either correct or constitutional. The principle of religious liberty in this country has a much longer history which declares that compulsory religion is not free exercise. Roger Williams wrote: "Forced worship is a stinck [sic] in the nostrils of God" (The Bloudy Tenet of Persecution); and Thomas Jefferson wrote in the Virginia Statute of Religious Liberty: "...no man shall be compelled to frequent or support a religious worship place or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, or shall otherwise suffer, on account of his religious opinions or beliefs." (Sec. II)

Voluntarism is the hallmark of the free exercise of religion. Compulsion in attendance at religious services, no matter what ends the Academies seek to achieve and no matter what their motives are, is patently not in keeping with either the spirit or the meaning of the "free exercise" clause of the First Amendment as interpreted by the Supreme Court.

3. Mandatory chapel attendance constitutes a religious test for holding an office or public trust under the United States, in violation of Article VI of the Constitution.

The Academies are closed communities in which conformity to tradition as well as to rules and regulations is expected by those in charge and by most of those who make up the student body. Short of administrative relief, which has been denied, or judicial relief, which is sought in this case, the issue of freedom of religion at the Academies becomes a moot issue. The individual who has strong conscientious scruples against compulsory religion, whether he is a believer or not, feels compelled, at present, to sublimate those scruples if he wants to graduate from one of the Academies and hold a commission in one of the armed services. To such a person compulsory religion, in the form of compulsory chapel attendance, constitutes a religious test to hold an office or public trust under the United States.

The fact that fewer than five percent of the officers in the armed services come from the Academies begs the question in this case. So does the related argument of de minimis.

Article VI of the Constitution is couched in absolute rather than relative terms. In this Article the Constitution is not selective. For the men in the Academies, chapel attendance is a religious test. Whether it is such a test for all other officers is not at issue. If mandatory chapel attendance is a religious test for any one person it is unconstitutional and should be so declared.

4. The principle of religious liberty which has permeated American constitutional development demands that government not use religion for ends appropriate to itself.

In arguing this position we are not saying that the ends of government are not important. There are many ends of government which do coincide with the objectives

of religion. However, the cases cited above clearly demonstrate that religious purposes are autonomous of the purposes of the state.

The United States District Court for the District of Columbia in this case agreed with appellees that chapel "...attendance is purely secular and an integral part of the military training accorded to the various groups of cadets; and that its primary effect is to instill in the cadets an understanding of the religious values which can at times motivate the men who will ultimately come under their command" (decision in Anderson v. Laird, Civil Action No. 169-70, filed July 31, 1970, p.6); also, "Highly trained military leaders are essential to national security, and the understanding gleaned from chapel attendance is necessary to mold the well-trained officer" Id., at 15; also, "...the purpose of required attendance at church or chapel service is wholly secular..." Id., at 17.

The appellees and the District Court are in agreement on the purpose of the compulsory chapel attendance requirement. Simply, it is the use of religion and religious services to achieve a purely secular end of the state.

Regardless of the merit of developing officers who are sensitive to their men's needs -- and, using the court's figures, more than 95 percent of the officers in the armed services have not had this special use of religion afforded at the Academies -- the training of officers is a secular objective of government. It is constitutionally inappropriate for government to use religion to achieve this goal. Worship or attendance at worship services must not be used as a training exercise. The government must not be allowed to continue to "use" God as an aid in military training. Any attempt by government to manipulate God and religion for proximate human purposes, however worthy those purposes may be in their own milieu, is tinged with blasphemy

and is also unconstitutional. As to the unconstitutional aspects, case law cited is clear.

CONCLUSION

The decision of the District Court for the District of Columbia should be reversed and requirement of compulsory chapel attendance at the United States Military Academy, West Point, New York, the United States Naval Academy, Annapolis, Maryland, and the United States Air Force Academy, Colorado Springs, Colorado, should be declared as contrary to Article VI of the Constitution of the United States of America and the "no establishment" and "free exercise" clauses of the First Amendment to that Constitution.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24617

MICHAEL B. ANDERSON, CADET, U.S.A., et al.,

Appellants,

v.

MELVIN R. LAIRD, et al.,

Appellees

BRIEF OF THE GENERAL COMMISSION ON CHAPLAINS AND ARMED FORCES PERSONNEL, *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF THE GENERAL COMMISSION ON CHAPLAINS AND ARMED FORCES PERSONNEL, *AMICUS CURIAE*

INTEREST OF AMICUS

By leave of this Honorable Court, the General Commission on Chaplains and Armed Forces Personnel appears *amicus* in support of appellants because of its vital concern for the preservation of religious liberty guaranteed under the First Amendment. The Commission was organized in 1917 by the major Protestant denominations supplying chaplains for the Armed Forces and was incorporated under the laws of the District of Columbia in 1955. The Commission is

presently comprised of 35 member denominations and five additional consultative and contributing religious bodies with an aggregate membership of 60,000,000 in the United States. The Commission and its related bodies currently recruit about 95% of the Protestant clergy who volunteer for duty with the military and in veterans hospitals. The Commission functions as a delegated, permanent conference on the chaplaincy of the Armed Forces and the Veterans Administration, and on the moral and religious welfare of armed forces personnel and hospitalized veterans.

In October of 1964 the Commission unsuccessfully petitioned the Department of Defense to remove by administrative action compulsory chapel attendance requirements at the Service Academies, a practice burdened with criticism and controversy throughout its history.

The Commission held then, and continues to hold, that this practice is contrary to the national principle of religious liberty, that no agency of government can properly use its coercive power to enforce attendance at religious exercises, that cadets and midshipmen (hereinafter referred to collectively as "cadets") are being exposed to an erroneous understanding of the responsibility of government in religious matters, and that the practice distorts the true nature of religion including the inherently voluntary character of its basic privileges and disciplines.

The Commission recognizes and strongly supports the obligation of the government to make reasonably adequate and appropriate provision for the religious needs of service personnel, but only on the basis of voluntary participation. While the Commission members are deeply committed to a religious view of life, as citizens of a secular state they also hold that any man may loyally and with honor and integrity serve his nation without accepting a traditional religious frame of reference.

The arguments offered by the government and adopted by the District Court are of great concern to the Commission. If this contested practice is, as the District Court holds,

solely for a secular purpose and is primarily a matter of military training, civilian church officials find difficulty in identifying with confidence any other point in the religious programs in the Armed Forces where the military might not be able to assert a similar over-riding claim in pursuit of its institutional requirements. Civilian church leaders charged with chaplaincy recruitment must now also seriously question whether clergymen can properly and with integrity continue to be released and approved by their ordaining bodies for a "purely secular" purpose and effect, as officially stated by the Government's attorneys and witnesses.

STATEMENT OF THE CASE

The three Service Academies require all cadets to attend Sunday religious services, either at the Academy chapels, where a Protestant, a Catholic and a Jewish service are held, or, in the case of two of the Academies, at a local denominational church in a neighboring community.[1] Whether conducted at the Academy chapel or at the local church, there is no dispute that these are worship services[2] and, as such, include all the liturgical, prayerful and reverent elements attendant to the creation of a religious atmosphere to enable the communicants or congregation to participate in a religious experience.

It is the cadets' contention, as supported by their evidence, that their forced attendance at a religious worship service violates the First Amendment to the U.S. Constitution by both aiding and, in certain respects, inhibiting the establishment of religion, while at the same time proscribing their free exercise of religion.

By contrast, the government's position, as its evidence asserts, is that only the cadets' attendance at, not participa-

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[1] As the Record has not been designated, all references to testimony will be to the District Court transcript.

[2] Tr. 274.

tion in, the worship services is required and that the purpose of this compulsory attendance is wholly secular as a training program to provide the cadets with an opportunity to observe the religious beliefs and practices of others. Further, the government argues that the primary effect of required attendance at a religious service is purely secular in that it enables those who will hold command positions to gain an awareness and respect for the impact religion has on the lives of men, especially in the time of combat crisis.

The District Court denied the cadets' prayer for declaratory and injunctive relief and held that the compulsory attendance at a religious service "is an integral and necessary part of the military training of the future officer corps, that its purpose is purely secular, and that its primary effect is purely secular."

QUESTION PRESENTED

Whether the Academies' regulations requiring cadets to attend Sunday religious worship services violate either the Establishment Clause or the Free Exercise Clause of the First Amendment to the United States Constitution, which provides in part that "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof."

SUMMARY OF ARGUMENT

In its most recent decision under the Religious Clauses of the First Amendment, *Walz v. Tax Commission*, 397 U.S. 664 (1970) the Supreme Court undertook to review the principles underlying these Clauses which have been developed in its prior cases. In a concurring opinion Mr. Justice Harlan stated, "Two concepts frequently articulated and applied in our cases . . . are *'neutrality'* and *'voluntarism'*." *Id.* at 694 (Italics supplied). In further explanation, the Justice said that these two principles mean that the govern-

ment must not act "to accord benefits that favor religion or nonreligion" nor "to encourage participation in or abnegation of religion." *Ibid.*

It is respectfully submitted, that the Academies regulations compelling the cadets to attend weekly worship services does violence to both of these concepts, evidencing neither neutrality toward religion nor insuring voluntarism in its expression. Upon the evidence adduced by either the cadets or the government, the Academies' regulations clearly violate the First Amendment in that, on the one hand, they advance and, in certain respects, inhibit religion prohibited under the Establishment Clause while, on the other hand, prevent the free exercise of religion protected under the Free Exercise Clause.

ARGUMENT

I.

THE REGULATIONS REQUIRING CADET ATTENDANCE AT A WORSHIP SERVICE VIOLATE THE ESTABLISHMENT CLAUSE.

A. They Contravene the Separation of Church and State.

To insure the "neutrality" of government toward religion under the Establishment Clause, the Supreme Court has repeatedly stated "The constitutional standard is the separation of Church and State." *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). No practice could be more repugnant to this standard than for the State to compel one to attend a religious service.

Indeed, the Colonial practice of compulsory church attendance and support was one of the principle objectionable interrelations between religion and government which gave

birth to the Establishment Clause,[3] and was one of the early features abolished in separating church from state. As noted by Mr. Justice Rutledge,

> "Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies." *Everson v. Board of Education* at 44 (dissenting opinion).

For example, in 1786 James Madison and Thomas Jefferson obtained enactment in Virginia of the Statute of Religious Freedom, which the Supreme Court has stated has "the same objective" and was "intended to provide the same protection" as the First Amendment.[4] This statute expressly provided:

> "That *no man shall be compelled to frequent or support any religious worship, place of ministry whatsoever,* nor shall be enforced, restrained, molested, or burthened in his body or goods nor shall otherwise suffer on account of his religious opinions or belief. . ." XII *Hening Statutes of Virginia* 84-86, (1823). (Italics supplied)

In light of this history to disentangle church and state, the Supreme Court has explicitly stated that at a minimum the Establishment Clause means that no man can be compelled to attend a religious service. The Court stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or nonattendance* . . . Neither a state nor the Federal Gov-

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[3] See *Everson v. Board of Education,* 330 U.S. 1, 9-11 (1946) and *Reynolds v. United States,* 98 U.S. 145, 162-63 (1878).

[4] *Id.* at 13.

> ernment can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, *the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." Everson v. Board of Education* at 15 (Italics supplied)[5]

In this case the government seeks to defend the Academies' regulations on the grounds that they only compel attendance at, not participation in, worship services.[6] Yet, *coerced attendance* was precisely what the Establishment Clause sought to prohibit. The government certainly would not contend that it could literally *compel participation*, even if that was its desire. The former demands dominion only of the body, the latter commands control over the mind; and as it is only the former that the State can exercise, it is precisely that which the First Amendment prohibits.

Moreover, the government asserts this compelled attendance is wholly secular as a part of its overall officers training program to provide cadets with an opportunity to observe the religious beliefs and practices of others, the effect of which will be to enable them to better understand the religious motivations and reactions of those under their command in times of crisis.[7] If this justification is accepted,

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[5]See also *McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1947); *McGowan v. Maryland*, 366 U.S. 420, 443 (1960); and *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1960).

[6]There is evidence in the record that, at least, an "appearance" of physical participation is required, e.g., standing and sitting when others do so.

[7]In this regard, in its opinion the District Court accorded considerable weight to the proposition "that the amount of judicial interference with the military should be limited; the amount of deference given the military in matters of discipline and training should be wide." (*Unprinted opinion*, pp. 7-8.) Suffice it to say, that former Chief Justice Warren, after a lengthy review of Supreme Court decisions relat- to various encroachments by the military upon the Bill of Rights, stated "a *most extraordinary showing of military necessity in defense of the Nation* has been required by the Court to conclude that the

there is no reason why compulsory worship attendance should not, and will not, become mandatory at every military installation and in every R.O.T.C. program training future officers, since less than five percent of all military officers attend the Academies. Indeed, this rationale would seem as well to warrant compulsory worship attendance for all non-commissioned officers, as their contact with those under their command is generally far more intimate and immediate, especially in time of crisis. Certainly, if the government prevails in its contention, there would appear no logical constitutional restraint on such extensions of these regulations.[8]

James Madison had just such a prospect in mind when he wrote his *Memorial and Remonstrance*, described by Mr. Justice Rutledge as "the most concise and most accurate statement of the First Amendment's author concerning what is 'an establishment of religion'."[9] Madison's admonitions seem particularly apt:

> "[I]t is proper to take alarm at the first experiment on our liberties . . . . The freemen of America did not wait till usurped power has strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle." *Writings of James Madison*, (Hunt

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challenged action in fact squared with the injunctions of the Constitution." Warren, *Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 197 (1962) (Italics supplied); See also, *Burns v. Wilson*, 346 U.S. 137 (1953) and *U.S. v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). No "most extraordinary showing of military necessity in defense of the Nation" was asserted by the government, nor established in the evidence, to justify the Academies compelling attendance at worship services.

[8]Other possible extensions pose equally frightening prospects. For example, if requiring attendance at religious services is purely secular in purpose and effect as part of the cadets "overall training program", there would appear no reason to prevent the Academies from prescribing the content of the services to insure a balanced and comprehensive instructional program.

[9]*Everson v. Board of Education* at 37.

Ed.), Vol. II, p. 185, *quoted in full* in *Everson v. Board of Education* at 63-72.

In sum, compulsory church attendance was early recognized as violative of the First Amendment's proscriptions. Any lingering vestiges should have long ago been removed and, when contested, should not be allowed to continue as an erosive influence on the principle of separation of church and state.[10] It is wise in this instance, in the words of Mr. Justice Harlan, "to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead," *Walz v. Tax Commission* at 699.

B. They Aid or Advance Religion

The regulations compelling attendance at worship services aid or advance religion in violation of the Establishment Clause in at least two ways. First, they assist organized religious faiths in their proselytization, instructional and inspirational programs, and, second, they give preference to certain religious faiths over others.

1. They aid organized religious faiths.

The Academies' regulations require cadets weekly to attend a worship service designed to proselytize, instruct and inspire within the teachings of a particular religious faith. The evidence establishes that no command control is exercised over the Academies' chaplains to conduct their worship services in any other vein. Nor indeed could any such control be exercised over the ministers, priests or rabbis con-

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[10]The District Court expressed the view that since these regulations had been in force for a long period of time, such "tradition cannot be lightly discarded" and weighed in favor of the constitutionality of the of the regulations. (*Unprinted opinion*, pp. 11-12.) However, an even longer tradition of Bible reading and prayers in public schools did not prevent such exercises from being declared violative of the First Amendment. *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

ducting services in the local community churches, which the cadets of two of the Academies may attend. Hence, those "of the faith" may be nuttured, inspired or admonished by their religious leadership or hierarchy, while a unique opportunity is afforded to proselytize or convert the non-believer.

Clearly these State provided opportunities for religious instruction and prosetylizing aid and advance religion. Quite analogous to this case was the Supreme Court's finding in *McCollum v. Board of Education*, 333 U.S. 203 (1947), where religious courses were made available in public schools only for those who desired to attend. Nevertheless, such a program violated the Establishment Clause because

> "The State also affords sectarian groups an invaluable aid in that it helps provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." *Id.* at 212.

Even more applicable to the instant case are the Supreme Court's decisions in the "prayer cases," *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963). In these cases the Supreme Court held that to require religious exercises as part of the curriculum in State public schools violated the Establishment Clause. Surely it is not any less a violation of that Clause to require *attendance* at religious exercises as part of the curriculum at the Academies. The government may contend that unlike the "prayer cases" there exists here no compulsory school attendance law requiring students to be exposed to such exercises. However, there certainly is no constitutional difference between, on the one hand, the State compelling a student to attend a State school where he is exposed to a religious exercise and, on the other hand, after his election to go to a State school to then compel him to attend a religious exercise. The gravemen in both instances remains the same - the State requiring attendance at religious exercises.

It is submitted that the Supreme Court's decisions in the "prayer cases" are dispositive of this case. In *Walz* Mr. Justice

Harlan discussed the rationale of *Engel* and *Schempp*, as applied to the question of church tax exemption, in the following vein:

> "This legislation [tax exemption] *neither encourages nor discourages participation in religious life* and thus satisfied the voluntarism requirement of the First Amendment. Unlike the instances of school prayers [citations omitted], the State is not *'utilizing the prestige, power, and influence' of a public institution to bring religion into lives of citizens."* *Walz v. Tax Commission* at 696 (Italics supplied).

The Academies' regulations compelling attendance at worship services are certainly encouraging participation in religious life with the full force of Academies' prestige, power and influence behind such an endeavor. This is precisely what the Establishment Clause prohibits.

Nor do the procedures whereby a cadet can with parental consent allegedly be excused from these exercises provide any relief from a violation of the Establishment Clause. In *Schempp*, where excusal procedures also existed, the Supreme Court stated:

> "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." *Abington School District v. Schempp* at 224-25.

Mr. Justice Clark, speaking for the Court in *Schempp*, stated that what the Establishment Clause prohibited was *"a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies."* *Id.* at 222. (Italics supplied).

Such an unconstitutional fusion or concert has occurred at the Academies. By requiring cadets to attend a weekly worship service, admittedly designed to instruct, inspire and proselytize in the tenets of that faith, the Academies are

clearly rendering official support to religion in violation of the Establishment Clause.

2. They prefer one religion over another.

The Supreme Court has repeatedly stated that the Establishment Clause prohibits any governmental laws or regulations "which aid one religion, aid all religions, or prefer one religion over another."[11] The evidence in this case clearly establishes that under the Academies' regulations preference is accorded certain religions over others by (1) the inherent limitations on the form of religious worship of an Academy chapel service, (2) the unavailability in certain instances of distinctively denominational services and (3) a clear preference for the orthodox religions.

The Protestant Chapel services of necessity must adhere to a form of worship which is best described as a "common-denominator observance" with important denominational distinctives muted or removed. As a consequence what is offered is invariably in conflict with the varied practices and liturgy of the many Protestant sects. Unquestionably, the modes of religious worship of the Quaker, the Unitarian, the Seventh Day Adventist and the Southern Baptist find little resemblance to such services. This situation is especially aggravated at West Point, where attendance at denominational churches is not available.[12]

Moreover, the Academies' regulations give preference to the orthodox religions or those believing in God over those religions founded on other beliefs. This the Establishment Clause clearly prohibits. As the Supreme Court has stated:

> "Neither [the State nor Federal Government] can constitutionally pass laws or impose requirements

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[11] *Everson v. Board of Education* at 15.

[12] For example, one West Point cadet, who was forced to attend the Protestant Chapel for four years, testified that the form of worship service (Episcopalian in nature) was in conflict with his Southern Baptist beliefs and practices. (Tr. 159, 167-68).

> which aid all religions as against non-believers and *neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*" *Torcaso v. Watkins.* 367 U.S. 488, 495. (Italics supplied)

Thus, those religions, such as Humanism or Rationalism, which profess no belief in a Supreme Being, but which under the doctrine of *U.S. v. Seeger,* 380 U.S. 163 (1965) stand equally as religions in our pluralistic society, are denied the preferential treatment accorded the traditional and established religions.[13]

C. They Have a Purpose and Primary Effect Which Inhibits Religion

The Supreme Court in *Abington School District v. Schempp* enunciated a quite explicit principle under which particular practices, such as religious exercises, could be tested against the prohibitions of the Establishment Clause. The Court stated:

> "The test may be stated as follows: what are the *purpose* and the *primary effect* of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222 (Italics supplied)

On the basis of the government's evidence alone, it is clear that the Academies' regulations requiring attendance at religious services have a purpose and primary effect which inhibit religion.

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[13]This situation is particularly aggravated at the Air Force Academy where the regulations state that cadets can only attend an off-base church that is "an established and cooperating Colorado Springs church as approved by the Senior Cadet Chaplain."

1. The purpose of compulsory attendance at worship services inhibits religion.

The government contends that the purpose of compulsory attendance at religious services is wholly secular as a training program to provide the cadets with an opportunity to observe and understand religious beliefs and practices of others.

Initially it must be said that this is an incredulous, as well as shocking, assertion by the government. It is unbelievable that the Academies would so blatantly seek to "use" religion for a secular purpose. One trusts that this is but a recently derived contention to seek to avoid the thrust of the First Amendment. If not, it is difficult to imagine a more offensive and devastating statement of purpose that would act to inhibit religion.

To use religious services for the "secular purpose" of a "training program" is clearly barred by the Establishment Clause. The Supreme Court has stated:

> "The Establishment Clause thus stands as an expression of the principle on the part of the founders of our Constitution that *religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Engel v. Vitale* at 431-32 (Italics supplied)

No greater perversion of religion could exist than to seek to use its worship services for solely a secular purpose. Worship services certainly are not conducted for secular purposes. Nor are they held as a laboratory for non-participants to observe the actions or feelings of those seeking a meaningful and devout relationship with their God and fellow believers. To compel cadets to attend sectarian services for secular purposes must of necessity inhibit religion in pursuit of its sacred goals.

The admonition of the Supreme Court in *Schempp* has been totally disregarded by the Academies regulations. There the Court said that "the place of religion in our society is an exalted one" and "we have come to recognize through bitter experience that it is not within the power of government to

invade the citadel" whatever its purpose may be.[14] In the instant case, the invasion is an intolerable perversion and mis-use of religion by the State.

Mr. Justice Brennan has stated that the Establishment Clause forbids "those involvements of religion with secular institutions which . . . *use essentially religious means to serve governmental ends, where secular means would suffice.*[15]

Certainly secular means exist to obtain the "training program" about religion, its beliefs, practices and effects upon mankind which the government asserts it desires for the cadets. Courses in comparative religion, the nature of American religious pluralism or the history of religion and its effect on man and civilization could be offered at the Academies.[16] Ethics courses could focus upon the predominate moral codes of mankind, including the ways in which those in command positions must understand and be sensitive to the convictions which may govern a subordinate's actions in times of stress or crisis. Particularly appropriate would be instruction on the freedom of religious practice afforded to armed forces personnel and the role and function of chaplains.

In sum, it is evident that the government's purpose would be far better served by secular curriculum instruction involving textual materials, study, discussion and debate than by requiring cadets merely "to sit and observe" others in worship. Acquiring an understanding of the religious beliefs of others is certainly not obtained by such passive instruction, particularly when one's exposure is limited to the same, and presumably one's own, denominational service week after week.

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[14] *Abington School District v. Schempp* at 226.

[15] *Id.* at 203 (concurring opinion) (Italics supplied).

[16] The Supreme Court has recognized that there is a constitutional difference between teaching religion and teaching *about* religion in public institutions. "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." *Id.* at 225.

2. The effect of compulsory attendance at worship services inhibits religion.

Nothing could have a more adverse effect upon a religious worship service than compelled attendance. Worship is an expression of free will. Internal motivation, not external compulsion, is the essence of a worshipful religious experience. The deleterious impact of compelled attendance upon such an experience was described by the Reverend Dean Kelly of the National Council of Churches in the following manner:

> "Worship is not a spectator sport. It is engaged in by a worshipping congregation. Great care is taken in instruction on this subject not to refer to the participating body, the worshipping body, as an audience. It is a congregation and the assumption is that every person present is participating.
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> I can think of nothing more deleterious to the worshipping experience of those seeking to worship than the presence of an apathetic observing group who, thought they may sit and stand, do not repeat the prayers or sing the hymns. That would have a chilling effect, I should think, upon the effort of worship of the worshipping congregation." (Tr. 336-7, April 29, 1970)

To command solely for "training purposes" the attendance of those cadets who would not otherwise attend not only breeds in them alienation and hostility toward religion, but degrades religion as a mere instructional tool of the State, demeans the calling of the chaplain in the service of his God as only a functionary of the State, desecrates the worship service as solely a laboratory for the observation of others, and distracts severely those who desire to participate in a meaningful religious experience. Taken together, the total effect is a destructive inhibition of religion.

If the government's contention is correct—that the *primary effect* of required attendance *is secular* in that it enables those who will hold command position to gain an appreciation of the force religion has on the lives of men, especially

in combat crisis—it has succeeded in completely corrupting and perverting the purpose of religious worship. As worship is a participatory activity, it is destructive of its purpose to be offered as a "demonstration." This is not to say that the opportunity for meaningful worship is limited solely to adhering participants, as the genuinely curious who *voluntarily* attend to learn or search for the faith afford no hindrance. But when a large, disinterested audience is compelled to attend "to observe" the very essence and meaning of a worship service are destroyed.

The function of the chaplain is equally corrupted and perverted. He becomes but an "actor" in the "play" of religion, since, as the government asserts, *the primary effect* of his "performance," and that of the "Greek chorus" of participating believers, is secular and only imparts to the observers an understanding of the religious beliefs and practices of others. By this assessment, and it is the government's, the chaplain's ministry could not be more demeaned, if not made an utter mockery.

The record abounds with the adverse effect the Academies' regulations have had on the attitudes toward religion of cadets forced to attend religious services.[17] Their reactions range from indifference to rejection and even hostility. Such feelings are understandable, religion having been "crammed down their throats" for four years. One may wonder how sensitive these officers have become through their "training program" to an "awareness and respect for the force religion has on the lives of men."

In sum, the Supreme Court has stated that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale* at 431 (1962). By seeking to utilize religion in pursuit of its "solely secular" purpose and attainment of its "purely secular" effect, the Academies have certainly in this

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[17] See, *e.g.*, Tr. 31-32, Feb. 9, 1970; Tr. 205, Feb. 10, 1970; Tr. 384-85, April 29, 1970; and Pl. Ex. 15.

blending of governmental and religious functions degraded this central and essential activity of religion.

II.

THE REGULATIONS REQUIRING CADET ATTENDANCE AT A WORSHIP SERVICE VIOLATE THE FREE EXERCISE CLAUSE

The regulations of the Academies compelling attendance at a religious service are inherently in conflict with the First Amendment's mandate that the State not prohibit "the free exercise" of religion. Due to the coercive nature of these regulations, cadets are denied in their religious expression both voluntarism and choice, which are the essence of religious freedom protected by the Free Exercise Clause.

A. Coercion in the Regulations.

The presence of coercion establishes a violation of the Free Exercise Clause. *Abington School Board v. Schempp, supra* at 223. The Academies' regulations by their very terms and in their application and enforcement exert such coercion. Initially they compel attendance *at a religious service,* either at an Academy chapel or, in the alternative, at a local denominational church.[18] A cadet is thus forced into an institutionalized religious practice, having no choice to seek expression of his religious convictions in any other manner or forum.

The regulations then in varying ways impose impediments to a cadet electing to attend different religious services. To exercise such an election, all the Academies require the concurrence of the parents and chaplains involved. In addition, at the Naval Academy, it must be proven that the change is not by "personal whim", but by a desire to actually change

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[18]The District Court found that violations are punishable in the same manner as violations of other Academy regulations, for example, by reprimands, demerits, marching tours, confinement to quarters and expulsion. (See *Unprinted Opinion,* p. 4)

religious affiliation, while at the Air Force Academy the choice is limited to a local church which is both "established" and "cooperates" with the Academy. The cumulative effect of these restrictions coerce a cadet into *regular* attendance at *one* chapel or church, preventing him from attending on any given Sunday the church of his choice.

Finally, the available procedures for cadets to be excused from compulsory chapel or church attendance have the quality of a mirage on the distant horizon, fading in their appearance upon close examination. Misled by this illusion and relying solely upon a 1969 policy statement of the Superintendents of the Academies,[19] not the actual procedures available at the Academies, the District Court determined the following with respect to excusal:

> "[A] cadet who has sincerely held convictions against church or chapel attendance may be excused from such attendance. . . . Thus when the effect on the individual cadet is opposite to that intended, i.e., when he becomes incapable of observing, assimilating or becoming involved with an understanding of the religious beliefs of men and finds himself turning away from an understanding of what their religious belief and value systems are, then he is relieved from the attendance requirement." (*Unprinted Opinion*, p. 5)

The evidence simply does not support that, in fact, excusal has been so simple in attainment. The government witnesses made it quite clear that under this policy statement and existing procedures a cadet could only be excused upon proving at a hearing "beyond any reasonable question of doubt" that chapel or church attendance had "abrasive counter productive effects" on him.[20] The evidence shows that proof of "abra-

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[19] "It is understood that intelligent provisions *must be made* for bonafide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen." (Italics added) This policy statement clearly expresses the need for, not the availability of, such intelligent provisions.

[20] Tr. 79, April 27, 1970.

sive counter productive effects" is obviously far greater to establish than a cadet asserting "sincerely held convictions against church or chapel attendance" to justify excusal, inasmuch as the following sincere convictions were deemed insufficient by the government's witnesses: that his freedom of religion was being violated;[21] that though he was a member of an established sect, his conscience dictated that he determine whether or not he would attend chapel or church;[22] that he does not believe in a Supreme Being;[23] or that due to the hypocrisy of compulsory chapel, his moral development was inhibited causing him to turn against religion.[24] Moreover, historically it would appear that seldom has a cadet been excused[25] and, in at least one instance, cadets who sought to be excused at West Point were invited to resign from the Academy.[26]

The coercive character of the alleged excusal procedures is quite evident. To obtain excusal a cadet is forced to pursue a procedure that is more apparent than real, bare an intolerable burden of proof, and run the risk of impairing his military career.

B. Freedom of Religion

The right to the "free exercise of religion" is generally considered the paramount right afforded protection under the Constitution. In the words of Mr. Justice Stewart:

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[21] *Ibid.*

[22] Tr. 119, April 27, 1970

[23] Tr. 138, April 27, 1970

[24] Pl. Ex. 15 and 17

[25] At West Point, there is no evidence that any cadet has been excused (Tr. 196, Feb. 10, 1970; Tr. 363, 374-5, April 29, 1970), while in forty years only three midshipmen at Annapolis have been excused (Tr. 114, Feb. 10, 1970).

[26] Tr. 367, April 29, 1970

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees then is the religious liberty protected by the Free Exercise Clause. . . ." *Sherbert v. Verner,* 374 U.S. 398, 413 (1963)(concurring opinion).

No better expression of the rationale and scope of this freedom can be found than in James Madison's Memorial and Remonstrance, which has been repeatedly accorded preeminence by the Supreme Court in interpreting the religious clauses of the First Amendment.

> "Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, *can be directed only by reason and conviction, not by force* or violence.' The *Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.* This right is in its nature an unalienable right.
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> If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an *'equal title to the free exercise of Religion according to the dictates of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." Memorial and Remonstrance, supra* at par. 1 and 6 (Italics added)

Implicit then in this "freedom to believe" is the concomitant "freedom to disbelieve," a freedom not acknowledged in the Academies' regulations compelling attendance at religious services.

The protection accorded an individual in his choice of religious worship by the Free Exercise Clause was succinctly stated by the Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Speaking for the Court, Mr. Justice Roberts said the following with respect to the Clause:

> "On the one hand, *it forestalls compulsion by law of* the acceptance of any creed or the *practice of any form of worship.* Freedom of conscience and *freedom to adhere to such* religious organization or *form of worship as the individual may choose cannot be restricted by law.* On the other hand, it safeguards the free exercise of the chosen form of religion." *Id.* at 303 (Italics supplied).

Similarly, in *Schempp* Mr. Justice Clark, speaking for the Court, underscored the principle that the Free Exercise Clause insures that every man be free from State coercion in determining the direction and expression of his religious life. The Justice stated that the Free Exercise Clause

> "recognizes the value of religious training, teaching and observance and, more particularly, the *right of every person to freely choose his own course with reference thereto, free of any compulsion from the state.* This the Free Exercise Clause guarantees." *Abington School District v. Schempp* at 222 (Italics supplied).

Such choice is clearly absent in the Academies' regulations. The State has "set the course" into institutionalized religious practice, allowing even then no deviation within this narrow channel without the concurrence of the State at every turn.

To be free in its exercise, it is essential that one's religion be uninhibited and unfettered by governmental restraint or coercion, and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert v. Verner* at 406. As no such abuse was asserted by the government in the instant case, no limitation whatsoever is warranted upon the cadets' "free exercise of religion."

If it be thought that the excusal procedures remove any unconstitutional impediment under the Free Exercise Clause,

it is clear that such procedures are themselves an infringment of the rights protected by the Clause. Mr. Justice Brennan in *Schempp* stated in this respect:

> "*The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused.* We have held in *Barnette* and *Torcaso*, respectively, that a State may require neither public school students nor candidates for an office of public trust to profess beliefs offensive to religious principles. By the same token *the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of absention.*" *Abington School Board v. Schempp* at 288-89 (Italics supplied)

In a concurring opinion in *Schempp*, Mr. Justices Goldberg and Harlan summarized the rights the Supreme Court has found to be secured by the religious clauses of the First Amendment in the following manner:

> "The fullest realization of true religious liberty requires that government neither engage in nor *compel religious practices*, that it *effect no favoritism* among sects or *between religion and nonreligion*, and that it *work deterence of no religious belief.*" *Abington School Board v. Schempp* at 305 (Italics supplied)

Beyond any question, by requiring that cadets attend religious services, the Academies do "compel religious practices" and "effect favoritism" of religion over nonreligion. Moreover, and of particular concern under the Free Exercise Clause, the evidence establishes that the coercive and restrictive nature of these regulations does "work deterence" of the religious beliefs held by the cadets. For these reasons, the Academies' regulations compelling attendance at religious services clearly violate the rights secured by the Free Exercise Clause.

CONCLUSION

This is not a complex case. It poses the simple issue of whether the State can compel a cadet to attend a religious worship service. For the reasons above stated, it is submitted that it cannot and that the Academies' regulations doing so violate both the Establishment Clause and Free Exercise Clause of the First Amendment. Accordingly, the decision of the District Court should be reversed and the appellants' prayer for declaratory and injunctive relief be granted.

Respectfully submitted,

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